CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1929

No. 375

WESTERN CARTRIDGE COMPANY, PETITIONER,

vs.

LOUIS L. EMMERSON, SECRETARY OF STATE OF THE STATE OF ILLINOIS

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

PETITION FOR CERTIORARI FILED SEPTEMBER 5, 1929

CERTIORARI GRANTED OCTOBER 21, 1929

(34,506)

(34,506)

SUPREME COURT OF THE UNITED STATES

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[fol. 3]

IN CIRCUIT COURT OF SANGAMON COUNTY

In Chancery

BILL OF COMPLAINT—Filed Aug. 18, 1927

To the Honorable Judges of the Circuit Court of Sangamon County, in Chancery Sitting:

Your orator, Western Cartridge Company, a corporation, represents and states to your Honors:

1. Your orator is a corporation organized and doing business under the laws of the State of Delaware and is licensed to do business in the State of Illinois.

2. Your orator is a corporation with issued par value capital stock of $5,701,800, with total property wherever located valued at $6,924,804.92, of which $6,894,903.27 in value is located in Illinois. Its total business transacted everywhere in the year 1926 was $11,670,925.51. Its total business constituted of intrastate commerce transacted by it at or from places of business in Illinois in 1926 was $1,919,-882.73. Its total business constituted of interstate commerce transacted by it at or from places of business in Illinois in 1926 was $9,751,042.78; the total amount of franchise tax or license fee paid as hereinafter alleged was $2,808.03, of which $1,328.81 was solely based upon and attributable to transactions in interstate commerce as hereinafter alleged.

[fol. 4] 3. Such business of your orator transacted everywhere and such business transacted by it at or from places of business in the State of Illinois in the year 1926, consisted of sales of goods, wares and merchandise.

4. Certain of your orator's such sales were sales the contracts for which involved the transportation of such goods, wares and merchandise across state lines, and such contracts were in fact as performed and the resulting transactions were transactions in interstate commerce.

5. The provisions of Section 105 of the General Corporation Act of Illinois as amended by the Act of May 12, 1927, are as follows:

"Sec. 105. Each corporation for profit, including railroads, except insurance companies, heretofore or hereafter organized under the laws of this State or admitted to do business in this State, and required by this Act to make an annual report, shall pay an annual license fee or franchise tax to the Secretary of State of five cents on each one hundred dollars of the proportion of its issued capital stock, or amount to be issued at once, represented by business transacted and property located in this State, but in no event shall the amount of such license fee or franchise tax be less than that required by this Act of corporations having no property or business in this State.

"In the event that the corporation has stock of no par value, its shares, for the purpose of fixing such fee, shall be taken and considered at the amount of the consideration received or to be received by such corporation for such shares."

6. At the present time and for some years last past Louis L. Emmerson is and has been the duly elected and qualified Secretary of State of the State of Illinois.

[fol. 5] 7. In the month of February, 1927, your orator filed in the office of said Louis L. Emmerson, Secretary of State of the State of Illinois, its Annual Report on, and in accordance with, the form of Annual Reports prescribed by said Louis L. Emmerson, as such Secretary of State of Illinois. In said Annual Report your orator set out among other things the amount of its par value capital stock issued, the total value of all of its property, the total value of all of its property located in Illinois, its total business transacted everywhere during the year 1926, and its total business for the said year transacted by it at or from places of business in the State of Illinois; and in showing the total business transacted at or from places of business in the State of Illinois your orator showed transactions in interstate commerce and transactions in intrastate commerce separately.

8. The transactions in interstate commerce set out in its Annual Report as above stated constituted and each of

them constituted sales of goods shipped in interstate commerce from places of business in Illinois to places and purchasers in other states pursuant to contracts providing therefor and involved in every case shipments across state lines.

9. Just prior to to-wit: July 1, 1927, Louis L. Emmerson, as such Secretary of State of Illinois, the defendant herein, assessed against your orator and demanded of your orator that it pay to him solely as a franchise tax or license fee for the privilege of transacting business in Illinois from July 1, 1927, to June 30, 1928, the sum of money heretofore set forth as the franchise tax paid by it. This sum of money amounts to five cents for each one hundred dollars of the issued par value capital stock represented by the proportion of its property located and business transacted in Illinois as compared to its total business and property wherever transacted and located, as computed as hereinafter shown in Paragraph 10th.

[fol. 6] 10. The said Louis L. Emmerson, Secretary of State of Illinois, defendant herein, in computing the aforesaid sum to be paid by your orator in the manner hereinabove set forth, included and insisted upon including the interstate business transacted by your orator at or from places of business in Illinois, to places in other states, as a part of the business transacted by your orator in Illinois, and your orator alleges that the assessment and collection of the said tax resulting from the inclusion of such interstate business as business transacted in Illinois is a burden on interstate commerce and is in violation of the clause of the Constitution of the United States giving the Congress power to regulate commerce among the several states.

11. Your orator protested to said Louis L. Emmerson, Secretary of State of Illinois against the payment of so much of said amount so demanded of it as was assessed upon the basis of and solely attributable to such interstate commerce transacted at or from places of business in Illinois, and your orator protested to said Louis L. Emmerson, Secretary of State of Illinois, against the payment of any amount so assessed against it, making known to said

Louis L. Emmerson that said Section 105 of said General Corporation Act was and is invalid, and that if valid it did not and does not provide for the inclusion of interstate commerce transacted at or from places of business in Illinois in the amount of business transacted in Illinois upon which the said franchise tax or license fee is based in its assessment, but said Louis L. Emmerson totally disregarded said protest and threatened that if the full amount so assessed and demanded to be paid was not paid on or before the last day of July, 1927, he would invoke or cause to be invoked against your orator those provisions of the General [fol. 7] Corporation Act of Illinois providing that if such taxes assessed are not paid before the thirty-first day of July in the year they are assessed they shall be deemed delinquent and there shall be added thereto and collected from each corporation five per cent for each month, or part of month, that the same is delinquent, and the provisions of said Act that such amounts so assessed, together with such interest and penalties and costs shall be a prior and first lien on the real estate and personal property of the taxpayer, and the provisions of said Act for a preemptory levy upon and sale of the property of such a taxpayer, and the provisions of said Act for dissolution of any corporation so delinquent in the payment of such taxes.

12. Your orator alleges that thereupon, on to-wit: July 30, 1927, it paid said total amount of such tax so assessed against and demanded from it under protest, both as to the total amount so paid and as to such amount attributable to interstate commerce, and that your orator made such payments under the duress and compulsion arising from such threats of said Louis L. Emmerson.

13. Your orator further represents and charges that the assessment and collection of the annual license fee or franchise tax against it by the said Louis L. Emmerson, Secretary of State of Illinois, defendant herein, in the manner hereinbefore set forth; namely, by the inclusion of interstate business between points in Illinois and points in other states, as aforesaid, as business transacted in Illinois is not in accordance with the said Section 105 of the said General Corporation Act of Illinois, and is therefore illegal, invalid and without authority of law, and arises from an in-

correct and erroneous interpretation or construction of said Section 105 of said Act.

[fol. 8] 14. Your orator further represents and charges that if the said Section 105 of the said General Corporation Act of Illinois, does require the said Louis L. Emmerson, Secretary of State of Illinois, defendant herein, to compute the annual license fee or franchise tax of Corporations in the manner heretofore set forth; namely, by the inclusion of interstate business as business transacted in Illinois, the said Section is invalid, unconstitutional and void because it lays an undue burden on interstate commerce in violation of the provisions of the Constitution of the United States granting the Congress power to regulate commerce among the several states, all to the hurt and injury of your orator.

15. Your orator further represents and charges that said Section 105 of said General Corporation Act of Illinois, as amended by the Act of May 12, 1927, is invalid, unconstitutional and void in that by the Act of May 12, 1927, the General Assembly of the State of Illinois purported to amend (with other sections) Section 105 of the General Corporation Act, which said Section had been declared invalid as to foreign corporations by the Supreme Court of Illinois in the case of O'Gara Coal Company v. Emmerson, 326 Ill. 18; and that the said Section 105, as a result of this decision, was necessarily invalid and unconstitutional as to domestic corporations, and in that the purported Section 105 of the said General Corporation act of Illinois purported to be as amended by said Act of May 12, 1927, was and is an attempted or pretended amendment of an invalid section; namely, Section 105 of said General Corporation Act.

[fol. 9] 16. Your orator further charges that the said Section 105 of said General Corporation Act of Illinois, as amended as aforesaid, is invalid, unconstitutional and void in that it requires par value stock to be taxed on the basis of the par value of said stock and requires non par value stock to be taxed on the basis of the consideration received or to be received for said shares, for the reason that it discriminates unreasonably between corporations with stock issued and not fully paid for, and corporations with stock issued and fully paid for, and for the further reason that

it provides a tax for the privilege of doing business in Illinois, the measure of which has no relation to the value or extent of the privilege; and in that for these reasons it deprives your orator of property without due process of law in violation of the Constitution of the State of Illinois and of the Constitution of the United States, all to the hurt and injury of your orator.

17. Your orator further represents that if said sum is so paid over to the said Treasurer of the State of Illinois by the said Louis L. Emmerson, Secretary of State of Illinois, defendant herein, said sum will be forever and irrevocably lost to your orator, and that your orator has not, and there does not exist, any remedy at law for the recovery thereof.

Therefore your orator prays that the said Louis L. Emmerson, Secretary of State of Illinois, who is made defendant to this Bill of Complaint, may be required to answer the same, (but not under oath, his answer under oath being hereby waived); that this Court may grant a preliminary injunction prior to the hearing on this Bill, and after the hearing, a permanent injunction, enjoining and restraining said defendant from turning over to or paying to the State Treasurer of the State of Illinois, the said sum of money so paid by your orator as the amount of said franchise tax [fol. 10] paid by it to the said defendant, or from otherwise disposing of the same; or, in case the Court finds that the said defendant should not be enjoined from paying over all of said sum, that he be enjoined from paying over to the State Treasurer of Illinois, the sum representing the amount of franchise tax collected from your orator and based on interstate business, and that after the hearing a decree may be entered requiring said defendant to return to your orator said sum of money so paid to said defendant; that said defendant may also be enjoined by preliminary injunction, and after the hearing by a permanent injunction, from forfeiting, annulling, cancelling, declaring void or otherwise interfering in any way with the authority and license of your orator to do business in the State of Illinois, or from declaring your orator without authority to do business in the State of Illinois, and that your orator may have such other relief as may be deemed equitable.

May it please your Honors to grant unto your orator the People's writ of Injunction to be directed to the defendant, said Louis L. Emmerson, enjoining and restraining him and his successors as such Secretary of State, from turning over to or paying to the State Treasurer of the State of Illinois the said sum of money being the amount of said franchise tax paid by it to the said defendant, or from otherwise disposing of the same; or, in case the Court finds that the said defendant should not be enjoined from paying over all of said sum, that he be enjoined from paying over to the State Treasurer of Illinois, the sum representing the amount of franchise tax collected from your orator and based on interstate business, or from otherwise disposing of it until the further order of the Court.

May it please your Honors to grant the writ of Summons in Chancery directed to the Sheriff of said County of Sanga-
[fol. 11] mon, commanding him that he summon the defendant, Louis L. Emmerson, Secretary of State of Illinois, to appear before the said Court on the first day of the next term thereof to be held at the Court House in the City of Springfield, in the County of Sangamon aforesaid, and then and there make answer to this Bill.

And your orator will ever pray.

Fyffe & Clarke, Solicitors for said Complainant.

Duly sworn to by John M. Glenn. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 12] In Circuit Court of Sangamon County

In Chancery

Western Cartridge Co., a Corporation,

vs.

Louis L. Emmerson, Secretary of State of the State of Illinois

Order for Injunction—Filed Aug. 19, 1927

This cause coming on to be heard upon motion of solicitors for the complainant here praying for a temporary

Writ of Injunction as hereinafter set forth, the complainant being represented by Fyffe & Clarke, solicitors, and the defendant by B. L. Catron, Assistant Attorney General of the State of Illinois, the Court having read the Bill of Complaint, duly verified, and having heard the arguments of counsel, and now being fully advised in the premises does order that a temporary writ of injunction be issued restraining Louis L. Emmerson as Secretary of State of the State of Illinois, commanding him to refrain and desist from paying to the State reasurer or into the Treasury of the State of Illinois, the sum of $2,808.03 heretofore paid [fol. 13] to him by the complainant herein under protest as and for its franchise tax or license fee and alleged by said Bill of Compla-nt to have been improperly assessed against it, and improperly collected from it by said Secretary of State as alleged in said Bill of Complaint.

Enter:

Norman L. Jones, Judge.

[File endorsement omitted.]

[fol. 14] In Circuit Court of Sangamon County

Writ of Injunction—Filed Aug. 19, 1927

The People of the State of Illinois to Louis L. Emmerson, Secretary of State of the State of Illinois, Greeting:

You, the said Louis L. Emmerson, Secretary of State of the State of Illinois and each of your clerks, deputies, agents, attorneys, servants and employes, or successors in office are hereby commanded, enjoined and restrained from paying to the State Treasurer or into the Treasury of the State of Illinois, the sum of $2,808.03 heretofore paid to you by the complainant herein under protest as and for its franchise tax or license fee and alleged by said Bill of Complanit to have been improperly assessed against it, and improperly collected from it by said Secretary of State as alleged in said Bill of Complaint, and you, the said Louis L. Emmerson, Secretary of State of the State of Illinois, and each of your clerks, deputies, agents, attorneys, servants and employes, or successors in office, are commanded,

enjoined and restrained, as aforesaid until the matters and things set forth and contained in a Bill or Petition in Chancery, this day filed in the office of the Circuit Court of Sangamon County, and State of Illinois, wherein Western Cartridge Co. a Corp. is Complainant and Louis L. Emmerson, Secretary of State of the State of Illinois, Defendant can be heard and determined in equity, or until the further order of the Sangamon County Circuit Court [fol. 15] in the premises, and this order and injunction, you, the said Louis L. Emmerson, Secretary of State of the State of Illinois, and each of your clerks, deputies, agents, attorneys, servants and employes, and successors in office, are to obey, keep, observe, and abide by, and in no wise omit so doing under the pains and penalties of the law.

To the Sheriff of said County to execute and return in due form of law.

Witness R. G. Moore, Clerk of said Court, and the Judicial Seal thereof, at Springfield, this 19th day of August, A. D. 1927.

R. G. Moore, Clerk. (Official Seal.)

[File endorsement omitted.]

STATE OF ILLINOIS,
Sangamon County, ss:

I have duly served the within writ on the within named Louis L. Emmerson, Secretary of State of the State of [fol. 16] Illinois by reading the within to him and at the same time delivering to him a true copy thereof, this 19th day of August A. D. 1927.

James M. Kent, Sheriff.

Fees:

Service	$1.00
Mileage	.40
Return	.25
Total	$1.65

Pd. by Fyffe & Clark.

IN CIRCUIT COURT OF SANGAMON COUNTY

[Titles omitted]

ORDERS EXTENDING TIME

Sept. 6, 1927.

Upon motion of the defendant by his solicitor leave is given him to answer by the 26th inst.

[fol. 17] Sept. 26, 1927.

Upon motion of the defendant by his solicitor it is ordered by the Court the *the* time to answer herein be and the same is extended to October 17th.

[fol. 18] IN CIRCUIT COURT OF SANGAMON COUNTY

[Title omitted]

ANSWER—Filed Oct. 17, 1927

The answer of Louis L. Emmerson, Secretary of State of the State of Illinois, defendant, to the bill of complaint of Western Cartridge Company, complainant.

This defendant, now and at all times hereafter saving and reserving unto himself all manner of benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties and other imperfections in the said bill of complaint contained, for answer thereunto says:

1. This defendant admits that the complainant is a corporation organized and doing business under the laws of the State of Delaware and is licensed to do business in the State of Illinois, with issued par value capital stock, total amount of property and property located in Illinois, and total amount of business transacted in the year 1926, as alleged in said bill of complaint, but denies that the total amount of business transacted by it in said year in Illinois in intrastate commerce and interstate commerce respectively, is correctly set forth in said bill; and this defend-
[fol. 19] ant admits that the total amount of franchise tax

paid by it for said year was $2,808.03, but denies that $1,328.81 of said amount was solely based upon or attributable transactions in interstate commerce, as alleged in said bill.

2. This defendant further answering admits that said business of the complainant during said year consisted of sales of goods, wares and merchandise, and that certain of such sales may have involved the transportation of such products across state lines and the performance of such transactions may have had some features of interstate commerce, but shows that such business was transacted principally in this State and had little or no elements of interstate commerce or business outside this State.

3. This defendant further answering admits that the provisions of Section 105 of the General Corporation Act of this State, as amended by the Act of May 12, 1927, are substantially as set forth in said bill and that this defendant is and has been for some years the duly elected and qualified Secretary of State of this State, and that in the month of February, 1927, the complainant filed in his office its annual report on forms prescribed by him, and therein set forth the amount of its par value capital stock issued, the total value of all its property and of that part thereof located in this State, the total amount of business transacted during the year 1926, and the amount thereof transacted at or from places of business in this State, but denies that in showing such business it correctly showed transactions in interstate and intrastate commerce separately, or that [fol. 20] the transactions in such alleged interstate commerce constituted sales of goods shipped in interstate commerce, although they may have involved to some extent the shipment of goods from places of business in Illinois to other states, pursuant to contracts therefor, as alleged in said bill.

4. This defendant further answering admits that prior to July 1, 1927, he assessed against the complainant and demanded that it pay as its franchise tax or license fee for the privilege of transacting business in this State from July 1, 1927, to June 30, 1928, the amount theretofore set forth as the franchise tax paid by it, being at the rate alleged on the issued capital stock represented by the pro-

portion of its property located and business transacted in this State as compared to its total business and property everywhere, and that in computing said amount he included such alleged interstate business transacted at or from places of business in Illinois as a part of the business transacted in this State, but denies that the assessment and collection of said tax is a burden upon interstate commerce or is in violation of the interstate commerce clause of the Constitution of the United States, as alleged in said Bill.

5. This defendant further answering admits that the complainant protested against the payment of so much of said amount as was assessed upon or attributable to such alleged interstate commerce and against the payment of any amount so assessed against it, contending that said Section 105 of said Act is invalid or that if valid it did not provide for the exclusion of such alleged interstate commerce, but that this defendant disregarded such protest and may have referred to the provisions of said Act, which might be invoked in case such tax was not paid pursuant thereto; [fol. 21] and this defendant admits that at about the time alleged the complainant paid the total amount of said tax so assessed against it under protest as alleged, but denies that such assessment and collection of said tax is not in accordance with said Section 105 or is invalid or incorrect, or that said Section is invalid or unconstitutional, or lays any undue burden on interstate commerce, in violation of the provisions of the Constitution of the United States; or that said Section 105, as amended by said Act of May 12, 1927, is invalid, unconstitutional or void for any of the supposed reasons alleged in said bill, or that it deprives the complainant of its property without due process of law in violation of the Constitution of this State, or of the United States, or that the complainant is entitled to the relief or any part thereof in its said bill demanded; and now having fully answered said bill, this defendant prays that he may be hence dismissed with his reasonable costs and charges in this behalf sustained.

Louis L. Emmerson, Secretary of State of the State of Illinois, by Oscar E. Carlstrom, Attorney General, Solicitor for Defendant. B. L. Catron, Assistant Attorney General, of Counsel.

[File endorsement omitted.]

[fols. 22 & 23] In Circuit Court of Sangamon County

Minute Entries

Nov. 3, 1927.

Order of Court: "It is ordered by the Court that all causes, motions, etc., not otherwise and finally disposed of, be continued to the next term of this Court."

* * * * * * *

"It is ordered that Court adjourn until Court in Course."

[fols. 24 & 25] Dec. 30, 1927.

Order of Court: "It is ordered by the Court that all causes, motions, etc., not otherwise and finally disposed of, be continued to the next term of this Court."

* * * * * * *

"It is ordered that Court adjourn until Court in Course."

[fol. 26] In Circuit Court of Sangamon County

In Chancery

[Title omitted]

Stipulation re Statement of Facts—Filed Feb. 28, 1928

It is hereby stipulated and agreed by and between the parties to the above entitled cause, by their respective solicitors, that the statement of facts made by the complainant hereto attached and verified by the affidavit of its officer having personal knowledge of such facts, or that they are so shown by the books and records of the complainant, may be taken [fol. 27] and considered as evidence of such facts presented in behalf of the complainant, in lieu of the introduction of the testimony of witnesses and documents mentioned in regard to the facts shown by such statement, for all pur-

poses for which such facts may be competent evidence under the pleadings herein.

Fyffe & Clarke, Solicitors for Complainant. Oscar L. Carlstrom, Attorney General, Solicitor for Defendant. B. L. Catron, Assistant Attorney General, of Counsel.

IN CIRCUIT COURT OF SANGAMON COUNTY

STATEMENT OF FACTS—Filed Feb. 28, 1928

The complainant in the above entitled cause states that it is engaged in the business of the manufacture and sale of small arms ammunition and brasses; that its principal office is located at East Alton, Illinois, and that such branch offices at which Illinois business is transacted are located at Springfield, Illinois; that the places of location of its factories connected with such business are at East Alton and Springfield, Illinois.

[fol. 28] That the total business of complainant in the calendar year 1926 was $11,670,925.51, and that of that total business transacted $9,751,042.78 thereof was and was transacted as follows:

Persons and corporations located in other states and countries than Illinois sent offers to purchase goods or orders for goods from their respective places of business in such other states and countries than Illinois to the complainant at its place of business at East Alton, Illinois. Such offers to purchase or orders were generally but not always in the form of Exhibit A or Exhibit B hereto attached and hereby made a part hereof, and in all cases in which such offers or orders were not in such form they were in substantially such form. All of said offers to purchase or orders provided for shipment f. o. b. one or the other of the aforesaid factories of the complainant in Illinois, and provided for shipment from one or the other of said factories of the complainant in Illinois to the purchasers respective places of business in such other states or countries. In the case of each of such offers or orders the complainant transmitted a written acceptance of the offer or order from the

EXHIBIT "A"

Western Cartridge Company

East Alton, Illinois, U. S. A.

Ammunition Order

Date.....

DISCOUNTS AND QUANTITY ON ORDER

LOADED SHELLS		CARTRIDGES	
Xpert	M	22 Shorts (Ball)	M
Super-X	M	Other Rim Fire	M
Field	M	Center Fire	M
Record	M		
New Chief	M		
Terms		Terms	

NOTE—

This order is placed at prices and terms stated herein and is subject to acceptance by the Company.

Verbal agreements between buyer and salesman will not be recognized.

In the event of the insolvency of the buyer, or sale, or transfer of the business of the buyer, this agreement may, at the option of the company, be rescinded.

All agreements are contingent upon strikes, floods, fires, accidents or other conditions beyond the control of the Company.

Ship To.....

.....

When..... Route.....

Quantity	Gauge	Shells	Drams Powder	Kind of Powder	Ounces Shot	Size of Shot		List per M	
						Drop	Chilled		

LOADED SHELLS

Xpert.....M.....

Super-X.....M.....

Field.....M.....

Record.....M.....

New Chief.....M.....

Terms.....

CARTRIDGES

22 Shorts (Ball).....M.....

Other Rim Fire.....M.....

Center Fire.....M.....

Terms.....

NOTE—

This order is placed at prices and terms stated herein and is subject to acceptance by the Company.

Verbal agreements between buyer and salesman will not be recognized.

In the event of the insolvency of the buyer, or sale, or transfer of the business of the buyer, this agreement may, at the option of the company, be rescinded.

All agreements are contingent upon strikes, floods, fires, accidents or other conditions beyond the control of the Company.

Ship To.....

.....

When..... Route.....

Quantity	Gauge	Shells	Drams Powder	Kind of Powder	Ounces Shot	Size of Shot		List per M	
						Drop	Chilled		
M								$	
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Representative..... Buyer.....

EXHIBIT "B"

WESTERN CARTRIDGE COMPANY

EAST ALTON, ILLINOIS

(B)

No._____ Date_____

Ship to_____

Town_____ State_____ When_____

Route_____ Terms:_____

NOTE:—This order is placed at prices and terms stated herein and is subject to acceptance by the Company. Verbal agreements between buyer and salesman will not be recognized. In the event of the insolvency of the buyer, or sale, or transfer of the business of the buyer, this agreement may, at the option of the company, be rescinded. All agreements are contingent upon strikes, floods, fires, accidents or other conditions beyond the control of the company.

QUANTITY	GAUGE	SHELL, POWDER AND SPECIFICATION	PRICE	
M				
M				
M				
M				
M				
M				
M				
M				
M				
M				
M				
M				
M				

For Shipment Through_____ Jobber

SALESMAN BUYER

PRICES AND TERMS ACCEPTED

EXHIBIT "C"

AMERICAN RAILWAY EXPRESS CO. TRIPLICATE NOT NEGOTIABLE

AT EAST ALTON, ILL., _____ 192__ From **Western Cartridge Co.**

The following described articles to be forwarded to consignee and destination as given below, subject to the terms and conditions of the Uniform Express Receipt prescribed by the Interstate Commerce Commission, and in effect on the date of shipment

~~06630~~ 03048

CONSIGNED TO _____

STREET ADDRESS _____

DESTINATION _____ STATE _____ COUNTY _____

No. Packages	DESCRIPTION OF ARTICLES, SPECIAL MARKS AND EXCEPTIONS	*WEIGHT (Sub. to Cor.)
	Cases Small Arms Ammunition (Loaded Paper Shells)	
	" " " " (Metallic Loaded Cartridges)	
	" " " Primers	
	" Shot	
	Barrels Clay Targets	
	Cases Target Traps	
	" Trap Repairs	
	" Sheet Brass, Not Perforated	
	" " Bronze " "	
	" " Nickel Silver, Not Perforated	
	" Brass Ferrules	
	" " Blanks, Unfinished Shapes, N. O. I. B. N.	
	" " Articles, N. O. I. B. N.	
	" Screw Shells (For Lamp Sockets)	
	" Lawn Sprinklers	
	Packages Advertising Matter (Described)	
	Cases	

PREPAID	COLLECT	C. O. D.	CHARGES	
		$ _____	Amt. $ _____	Value herein declared by shipper to be _____

WESTERN CARTRIDGE CO., Shipper

Per _____

For the Express Co.

290964 BUSINESS CARGO SYSTEMS, CHICAGO

AMERICAN RAILWAY EXPRESS CO.

QUADRUPLICATE
–NOT NEGOTIABLE

AT EAST ALTON, ILL., _____ 192__

From **Western Cartridge Co.**

The following described articles to be forwarded to consignee and destination as given below, subject to the terms and conditions of the Uniform Express Receipt prescribed by the Interstate Commerce Commission, and in effect on the date of shipment.

06630

CONSIGNED TO _____

STREET ADDRESS _____

DESTINATION _____ STATE _____ COUNTY _____

No. Packages	DESCRIPTION OF ARTICLES, SPECIAL MARKS AND EXCEPTIONS	*WEIGHT (Sub. to Cor.)
	Cases Small Arms Ammunition (Loaded Paper Shells)	
	" " " " (Metallic Loaded Cartridges)	
	" " " Primers	
	" Shot	
	Barrels Clay Targets	
	Cases Target Traps	
	" Trap Repairs	
	" Sheet Brass, Not Perforated	
	" " Bronze " "	
	" " Nickel Silver, Not Perforated	
	" Brass Ferrules	
	" " Blanks, Unfinished Shapes, N. O. I. B. N.	
	" " Articles, N. O. I. B. N.	
	" Screw Shells (For Lamp Sockets)	
	" Lawn Sprinklers	
	Packages Advertising Matter (Described)	
	Cases	

PREPAID	COLLECT	C. O. D.	CHARGES	
		$ _____	Amt. $_____	Value herein declared by shipper to be_____

WESTERN CARTRIDGE CO., Shipper

Per_____

For the Express Co.

290964 BUSINESS UARCO SYSTEMS, CHICAGO

32-A

EXHIBIT "D"

(For use in connection with Uniform Domestic Straight Bill of Lading adopted by Carriers in Official, Southern and Western Classification territories, March 15, 1922.) (Prescribed by the Interstate Commerce Commission.)

THIS MEMORANDUM is an acknowledgment that a bill of lading has been issued and is not the Original Bill of Lading, nor a copy or duplicate, covering the property named therein, and is intended solely for filing or record. RECEIVED, subject to the classifications and tariffs in effect on the date of the receipt by the carrier of the property described in the Original Bill of Lading.

At East Alton, Ill., _____ 192__ FROM **WESTERN CARTRIDGE CO.**

_____ Company Agent's No. _____ Shipper's No. 08975

The property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

(Mail or street address of consignee—For purpose of notification only.)

Consigned to _____

Destination _____ State of _____ County of _____

Route _____ Car Initial _____ Car No. _____

No. Packages	DESCRIPTION OF ARTICLES, SPECIAL MARKS AND EXCEPTIONS	*Weight (Sub. to Cor.)	Class or Rate	Ck. Col.
	Cases Small Arms Ammunition (Loaded Paper Shells)			
	" " " " (Metallic Loaded Cartridges)			
	" " " Primers			
	" Shot			
	Gunnies (Bags) Shot			
	Barrels Clay Targets			
	Cases Target Traps			
	" Sheet Brass, Not Perforated .005" and thicker			
	" Sheet Bronze, Not Perforated .005" and thicker			
	" Sheet Nickel, (German) Silver Not Perforated .005" and thicker			
	" Sheet Brass, Perforated .005" and thicker			
	" Brass Ferrules			
	" Brass Blanks (Unfinished Shapes)			
	" Screw Shells (for Lamp Sockets)			
	" Lawn Sprinklers			
	" Brass Articles (N. O. S.)			
	Cases			
	Barrels			

If this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges. (See section 7 of conditions.)

WESTERN CARTRIDGE CO.

Per _____

If charges are to be prepaid, write or stamp here, "To be Prepaid."

Received $ _____ to apply in prepayment of the charges on the property described hereon.

Agent or Cashier.

Per _____

(The signature here acknowledges only the amount prepaid.)

Charges Advanced: $ _____

3

East Alton, Ill. 19__ FROM WESTERN CARTRIDGE CO.

_____ Company Agent's No. _____ Shipper's No. 08975

the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

(Mail or street address of consignee—For purposes of notification only.)

Consigned to _____

Destination _____ State of _____ County of _____

Route _____ Car Initial _____ Car No. _____

No. Packages	DESCRIPTION OF ARTICLES, SPECIAL MARKS AND EXCEPTIONS	*Weight (Subj. to Cor.)	Class or Rate	Ck. Col.
	Cases Small Arms Ammunition (Loaded Paper Shells)			
	" " " " (Metallic Loaded Cartridges)			
	" " " Primers			
	" Shot			
	Gunnies (Bags) Shot			
	Barrels Clay Targets			
	Cases Target Traps			
	" Sheet Brass, Not Perforated .005" and thicker			
	" Sheet Bronze, Not Perforated .005" and thicker			
	" Sheet Nickel, (German) Silver Not Perforated .005" and thicker			
	" Sheet Brass, Perforated .005" and thicker			
	" Brass Ferrules			
	" Brass Blanks (Unfinished Shapes)			
	" Screw Shells (for Lamp Sockets)			
	" Lawn Sprinklers			
	" Brass Articles (N. O. S.)			
	Cases			
	Barrels			

If this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges. (See section 7 of conditions.)

WESTERN CARTRIDGE CO.

Per _____

If charges are to be prepaid, write or stamp here, "To be Prepaid."

Received $ _____ to apply in prepayment of the charges on the property described herein.

Agent or Cashier.

Per _____

(The signature here acknowledges only the amount prepaid.)

Charges Advanced: $ _____

3

*If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is "carrier's or shipper's weight."
NOTE—Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property.

The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding _____ per _____

This is to certify that the above articles are properly described by name and are packed and marked and are in proper condition for transportation according to the regulations prescribed by the Interstate Commerce Commission.

Shipper's imprint in lieu of stamp; not a part of Bill of Lading approved by the Interstate Commerce Commission.

WESTERN CARTRIDGE CO., Shipper, Per _____ Agent _____ Per _____

Permanent Post-Office Address of Shipper: EAST ALTON, ILL.

274349 UNITED BUSINESS SYSTEMS, CHICAGO

CONTRACT TERMS AND CONDITIONS

Sec. 1. (a) The carrier or party in possession of any of the property herein described shall be liable as at common law for any loss thereof or damage thereto except as hereinafter provided.

(b) No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, the authority of law, or the act or default of the shipper or owner, or for natural shrinkage. The carrier's liability shall be that of warehouseman, only, for loss, damage, or delay caused by fire occurring after the expiration of the free time allowed by tariffs lawfully on file (such free time to be computed as therein provided) after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination, or tender of delivery of the property to the party entitled to receive it, has been made. Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall lie on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon the request of the shipper, owner, or party, entitled to make such request, or resulting from a defect or vice in the property, or for country damage to cotton, or from riots or civil or military authorities, or for the carrier's dispatch or want of dispatch in procuring perishable property.

(c) In case of quarantine the property may be discharged at risk and expense of owners into quarantine depot or elsewhere, as required by quarantine regulations or authorities, or for the carrier's dispatch at nearest available point in carrier's judgment, and in any such case carrier's responsibility shall cease when property is so discharged, or property may be returned by carrier at owner's expense to shipping point, earning freight both ways. Quarantine expenses of whatever nature or kind upon or in respect to property shall be borne by the owners of the property or be a lien thereon. The carrier shall not be liable for loss or damage occasioned by fumigation or disinfection or other acts required or done by quarantine regulations or authorities even though the same may have been done by carrier's officers, agents, or employees, nor for detention, loss, or damage of any kind occasioned by quarantine or the enforcement thereof. No carrier shall be liable, except in case of negligence, for any mistake or inaccuracy in any information furnished by the carrier, its agents, or officers, as to quarantine laws or regulations. The shipper shall hold the carriers harmless from any expense they may incur, or damages they may be required to pay, by reason of the introduction of the property covered by this contract into any place against the quarantine laws or regulations in effect at such place.

Sec. 2. (a) No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch. Every carrier shall have the right in case of physical necessity to forward said property by any carrier or route between the point of shipment and the point of destination. In all cases not prohibited by law, where a lower value than actual value has been represented in writing by the shipper or has been agreed upon in writing as the released value of the property as determined by the classification or tariffs upon which the rate is based, such lower value plus freight charges if paid shall be the maximum amount to be recovered, whether or not such loss or damage occurs from negligence.

(b) Claims for loss, damage, or injury to property must be made in writing to the originating or delivering carrier or carriers issuing this bill of lading within six months after delivery of the property (or, in case of export traffic, within nine months after delivery at port of export) or, in case of failure to make delivery, then within six months (or nine months in case of export traffic) after a reasonable time for delivery has elapsed; provided that if such loss, damage, or injury was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery. Suits for loss, damage, injury, or delay shall be instituted only within two years and one day after delivery of the property, or in case of failure to make delivery, then within two years and one day after a reasonable time for delivery has elapsed: Provided, That in case the claim on which suit is based was made in writing within six months, or nine months in case of export traffic (whether or not filing of such claim is required as a condition precedent to recovery), suit shall be instituted not later than two years and one day after notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice.

(c) Any carrier or party liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance: Provided, That the carrier reimburse the claimant for the premium paid thereon.

Sec. 3. Except where such service is required as the result of carrier's negligence, all property shall be subject to necessary cooperage and baling at owner's cost. Each carrier over whose route cotton or cotton linters is to be transported hereunder shall have the privilege, at its own cost and risk, of compressing the same for greater convenience in handling or forwarding, and shall not be held responsible for deviation or unavoidable delays in procuring such compression. Grain in bulk consigned to a point where there is a railroad, public or licensed elevator, may (unless otherwise expressly noted herein, and then if it is not promptly so unloaded) be there delivered and placed with other grain of the same kind and grade without respect to ownership (and prompt notice thereof shall be given to the consignor), and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

Sec. 4. (a) Property not removed by the party entitled to receive it within the free time allowed by tariffs, lawfully on file (such free time to be computed as therein provided), after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination has been made, may be kept in vessel, car, depot, warehouse or place of delivery of the carrier, subject to the tariff charge for storage and to carrier's responsibility as warehouseman, only, or at the option of the carrier, may be removed to and stored in a public or licensed warehouse at the place of delivery or other available place, at the cost of the owner, and there held without liability on the part of the carrier and subject to lien for all freight and other lawful charges, including a reasonable charge for storage.

(b) Where nonperishable property which has been transported to destination hereunder is refused by consignee or the party entitled to receive it, or said consignee or party entitled to receive it fails to receive it within 15 days after notice of arrival shall have been duly sent or given, the carrier may sell the same at public auction to the highest bidder, at such place as may be designated by the carrier: Provided, That the carrier shall have first mailed, postage prepaid, to the consignee notice that the property has been refused or remains unclaimed, as the case may be, and that it will be subject to sale under the terms of the bill of lading if disposition be not arranged for, and shall have published notice containing a description of the property, the name of the party to whom consigned, or, if shipped order notify, the name of the party to be notified, and the time and place of sale, once a week for two successive weeks, in a newspaper of general circulation at the place of sale or nearest place where such newspaper is published: Provided, That 30 days shall have elapsed before publication of notice of sale after said notice that the property was refused or remains unclaimed was mailed, sent, or given.

(c) Where perishable property which has been transported hereunder to destination is refused by consignee or party entitled to receive it, or said consignee or party entitled to receive it shall fail to receive it promptly, the carrier may, in its discretion, to prevent deterioration or further deterioration, sell the same to the best advantage at private or public sale: Provided, That if time serves for notification to the consignor or owner of the refusal of the property or the failure to receive it and request for disposition of the property, such notification shall be given, in such manner as the exercise of due diligence requires, before the property is sold.

(d) Where the procedure provided for in the two paragraphs last preceding is not possible, it is agreed that nothing contained in said paragraphs shall be construed to abridge the right of the carrier at its option to sell the property under such circumstances and in such manner as may be authorized by law.

(e) The proceeds of any sale made under this section shall be applied by the carrier to the payment of freight, demurrage, storage, and any other lawful charges and the expense of notice, advertisement, sale, and other necessary expense and of caring for and maintaining the property, if proper care of the same requires special expense, and should there be a balance it shall be paid to the owner of the property sold hereunder.

(f) Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed freight agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and, except in case of carrier's negligence, when received from or delivered to such stations, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from locomotive or train or until loaded into and after unloaded from vessels.

Sec. 5. No carrier hereunder will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classifications or tariffs unless a special agreement to do so and a stipulated value of the articles are indorsed hereon.

Sec. 6. Every party, whether principal or agent, shipping explosives or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for and indemnify the carrier against all loss or damage caused by such goods, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

Sec. 7. The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property; but, except in those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid. The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignee shall not be liable for such charges. Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.

Sec. 8. If this bill of lading is issued on the order of the shipper, or his agent, in exchange or in substitution for another bill of lading, the shipper's signature to the prior bill of lading as to the statement of value or otherwise, or election of common law or bill of lading liability, in or in connection with such prior bill of lading, shall be considered a part of this bill of lading as fully as if the same were written or made in or in connection with this bill of lading.

Sec. 9. (a) If all or any part of said property is carried by water over any part of said route, such water carriage shall be performed subject to all the terms and provisions of, and all the exemptions from liability contained in, the Act of the Congress of the United States, approved on February 13, 1893, and entitled "An act relating to the navigation of vessels, etc.," and of other statutes of the United States according carriers by water the protection of limited liability, and to the conditions contained in this bill of lading not inconsistent therewith or with this section.

(b) No such carrier by water shall be liable for any loss or damage resulting from any fire happening to or on board the vessel, or from explosion, bursting of boilers or breakage of shafts, unless caused by the design or neglect of such carrier.

(c) If the owner shall have exercised due diligence in making the vessel in all respects seaworthy and properly manned, equipped, and supplied, no such carrier shall be liable for any loss or damage resulting from the perils of the lakes, seas, or other waters, or from latent defects in hull, machinery, or appurtenances whether existing prior to, at the time of, or after sailing, or from collision, stranding, or other accidents of navigation, or from prolongation of the voyage. And, when for any reason it is necessary, any vessel carrying any or all of the property herein described shall be at liberty to call at any port or ports, in or out of the customary route, to tow and be towed, to transfer, trans-ship, or lighter, to load and discharge goods at any time, to assist vessels in distress, to deviate for the purpose of saving life or property, and for docking and repairs. Except in case of negligence such carrier shall not be responsible for any loss or damage to property if it be necessary or is usual to carry the same upon deck.

(d) General average shall be payable according to York-Antwerp Rules, 1890, and, as to any matter not therein provided for, according to the law and usage of the port of New York. If the owners shall have exercised due diligence to make the vessel in all respects seaworthy and properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from faults or errors in navigation, or in the management of the vessel, or from any latent or other defects in the vessel, her machinery or appurtenances, or from unseaworthiness, whether existing at the time of shipment or at the beginning of the voyage (provided the latent or other defects or the unseaworthiness was not discoverable by the exercise of due diligence), the shippers, consignees and / or owners of the cargo shall nevertheless pay salvage and any special charges incurred in respect of the cargo, and shall contribute with the shipowner in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred for the common benefit or to relieve the adventure from any common peril.

(e) If the property is being carried under a tariff which provides that any carrier or carriers party thereto shall be liable for loss from perils of the sea, then as to such carrier or carriers the provisions of this section shall be modified in accordance with the tariff provisions, which shall be regarded as incorporated into the conditions of this bill of lading.

(f) The term "water carriage" in this section shall not be construed as including lighterage in or across rivers, harbors, or lakes, when performed by or on behalf of rail carriers.

Sec. 10. Any alteration, addition, or erasure in this bill of lading which shall be made without the special notation hereon of the agent of the carrier issuing this bill of lading, shall be without effect, and this bill of lading shall be enforceable according to its original tenor.

(For use in connection with Uniform Domestic Straight Bill of Lading adopted by Carriers in Official, Southern and Western Classification territories, March 15, 1922.) (Prescribed by the Interstate Commerce Commission.)

THIS MEMORANDUM is an acknowledgment that a bill of lading has been issued and is not the Original Bill of Lading, nor a copy or duplicate, covering the property named therein, and is intended solely for filing or record. RECEIVED, subject to the classifications and tariffs in effect on the date of the receipt by the carrier of the property described in the Original Bill of Lading.

At East Alton, Ill., _____ 192__ FROM **WESTERN CARTRIDGE CO.**

_____ Company Agent's No. _____ Shipper's No. 08975

the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

(Mail or street address of consignee—For purposes of notification only.)

Consigned to _____

Destination _____ State of _____ County of _____

Route _____ Car Initial _____ Car No. _____

No. Packages	DESCRIPTION OF ARTICLES, SPECIAL MARKS AND EXCEPTIONS	*Weight (Subj. to Cor.)	Class or Rate	Ck. Col.
	Cases Small Arms Ammunition (Loaded Paper Shells)			
	" " " " (Metallic Loaded Cartridges)			
	" " " Primers			
	" Shot			
	Gunnies (Bags) Shot			
	Barrels Clay Targets			
	Cases Target Traps			
	" Sheet Brass, Not Perforated .005" and thicker			
	" Sheet Bronze, Not Perforated .005" and thicker			
	" Sheet Nickel, (German) Silver Not Perforated .005" and thicker			
	" Sheet Brass, Perforated .005" and thicker			
	" Brass Ferrules			
	" Brass Blanks (Unfinished Shapes)			
	" Screw Shells (for Lamp Sockets)			
	" Lawn Sprinklers			
	" Brass Articles (N. O. S.)			
	Cases			
	Barrels			

If this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges. (See section 7 of conditions.)

WESTERN CARTRIDGE CO.

Per _____

If charges are to be prepaid, write or stamp here, "To be Prepaid."

Received $ _____ to apply in prepayment of the charges on the property described hereon.

_____ Agent or Cashier.

Per _____

(The signature here acknowledges only the amount prepaid.)

Charges Advanced $ _____

4

*If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is "carrier's or shipper's weight."
NOTE—Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property.

The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding _____ per _____

This is to certify that the above articles are properly described by name and are packed and marked and are in proper condition for transportation according to the regulations prescribed by the Interstate Commerce Commission.

Shipper's imprint in lieu of stamp; not a part of Bill of Lading approved by the Interstate Commerce Commission.

WESTERN CARTRIDGE CO., Shipper, Per _____ Agent _____ Per _____

Permanent Post-Office Address of Shipper: EAST ALTON, ILL.

274349 UNITED BANKNOTE PRINTING COMPANY

33-B

CONTRACT TERMS AND CONDITIONS

Sec. 1. (a) The carrier or party in possession of any of the property herein described shall be liable as at common law for any loss thereof or damage thereto except as hereinafter provided.

(b) No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, the authority of law, or the act or default of the shipper or owner, or for natural shrinkage. The carrier's liability shall be that of warehouseman, only, for loss, damage, or delay caused by fire occurring after the expiration of the free time allowed by tariffs lawfully on file (such free time to be computed as therein provided) after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination, or tender of delivery of the property to the party entitled to receive it, has been made. Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession) the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon the request of the shipper, owner, or party, entitled to make such request, or resulting from a defect or vice in the property, or for country damage to cotton, or from riots or strikes.

(c) In case of quarantine the property may be discharged at risk and expense of owners into quarantine depot or elsewhere, as required by quarantine regulations or authorities, or for the carrier's dispatch at nearest available point in carrier's judgment, and in any such case carrier's responsibility shall cease when property is so discharged, or property may be returned by carrier at owner's expense to shipping point, earning freight both ways. Quarantine expenses of whatever nature or kind upon or in respect to property shall be borne by the owners of the property or be a lien thereon. The carrier shall not be liable for loss or damage occasioned by fumigation or disinfection or other acts required or done by quarantine regulations or authorities even though the same may have been done by carrier's officers, agents, or employees, nor for detention, loss, or damage of any kind occasioned by quarantine or the enforcement thereof. No carrier shall be liable, except in case of negligence, for any mistake or inaccuracy in any information furnished by the carrier, its agents, or officers, as to quarantine laws or regulations. The shipper shall hold the carriers harmless from any expense they may incur, or damages they may be required to pay, by reason of the introduction of the property covered by this contract into any place against the quarantine laws or regulations in effect at such place.

Sec. 2. (a) No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch. Every carrier shall have the right in case of physical necessity to forward said property by any carrier or route between the point of shipment and the point of destination. In all cases not prohibited by law, where a lower value than actual value has been represented in writing by the shipper or has been agreed upon in writing as the released value of the property as determined by the classification or tariffs upon which the rate is based, such lower value plus freight charges if paid shall be the maximum amount to be recovered, whether or not such loss or damage occurs from negligence.

(b) Claims for loss, damage, or injury to property must be made in writing to the originating or delivering carrier or carriers issuing this bill of lading within six months after delivery of the property (or, in case of export traffic, within nine months after delivery at port of export) or, in case of failure to make delivery, then within six months (or nine months in case of export traffic) after a reasonable time for delivery has elapsed; provided that if such loss, damage, or injury was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery. Suits for loss, damage, injury, or delay shall be instituted only within two years and one day after delivery of the property, or in case of failure to make delivery, then within two years and one day after a reasonable time for delivery has elapsed; Provided, That in case the claim on which suit is based was made in writing within six months, or nine months in case of export traffic (whether or not filing of such claim is required as a condition precedent to recovery), suit shall be instituted not later than two years and one day after notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice.

(c) Any carrier or party liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance: Provided, That the carrier reimburses the claimant for the premium paid thereon.

Sec. 3. Except where such service is required as the result of carrier's negligence, all property shall be subject to necessary cooperage and baling at owner's cost. Each carrier over whose route cotton or cotton linters is to be transported hereunder shall have the privilege, at its own cost and risk, of compressing the same for greater convenience in handling or forwarding, and shall not be held responsible for deviation or unavoidable delays in procuring such compression. Grain in bulk consigned to a point where there is a railroad, public or licensed elevator, may (unless otherwise expressly noted herein, and then if it is not promptly unloaded) be there delivered and placed with other grain of the same kind and grade without respect to ownership (and prompt notice thereof shall be given to the consignor), and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

Sec. 4. (a) Property not removed by the party entitled to receive it within the free time allowed by tariffs, lawfully on file (such free time to be computed as therein provided), after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination has been made, may be kept in vessel, car, depot, warehouse or place of delivery of the carrier, subject to the tariff charge for storage and to carrier's responsibility as warehouseman, only, or at the option of the carrier, may be removed to and stored in a public or licensed warehouse at the place of delivery or other available place, at the cost of the owner, and there held without liability on the part of the carrier and subject to lien for all freight and other lawful charges, including a reasonable charge for storage.

(b) Where nonperishable property which has been transported to destination hereunder is refused by consignee or the party entitled to receive it, or said consignee or party entitled to receive it fails to receive it within 15 days after notice of arrival shall have been duly sent or given, the carrier may sell the same at public auction to the highest bidder, at such place as may be designated by the carrier: Provided, That the carrier shall have first mailed, sent, or given to the consignor notice that the property has been refused or remains unclaimed, as the case may be, and that it will be subject to sale under the terms of the bill of lading if disposition be not arranged for, and shall have published notice containing a description of the property, the name of the party to whom consigned, or, if shipped order notify, the name of the party to be notified, and the time and place of sale, once a week for two successive weeks, in a newspaper of general circulation at the place of sale or nearest place where such newspaper is published: Provided, That 30 days shall have elapsed before publication of notice of sale after said notice that the property was refused or remains unclaimed was mailed, sent, or given.

(c) Where perishable property which has been transported hereunder to destination is refused by consignee or party entitled to receive it, or said consignee or party entitled to receive it shall fail to receive it promptly, the carrier may, in its discretion, to prevent deterioration or further deterioration, sell the same to the best advantage at private or public sale: Provided, That if time serves for notification to the consignor or owner of the refusal of the property or the failure to receive it and request for disposition of the property, such notification shall be given, in such manner as the exercise of due diligence requires, before the property is sold.

(d) Where the procedure provided for in the two paragraphs last preceding is not possible, it is agreed that nothing contained in said paragraphs shall be construed to abridge the right of the carrier at its option to sell the property under such circumstances and in such manner as may be authorized by law.

(e) The proceeds of any sale made under this section shall be applied by the carrier to the payment of freight, demurrage, storage, and any other lawful charges and the expense of notice, advertisement, sale, and other necessary expense and of caring for and maintaining the property, if proper care of the same requires special expense, and should there be a balance it shall be paid to the owner of the property sold hereunder.

(f) Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed freight agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and, except in case of carrier's negligence, when received from or delivered to such stations, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from locomotive or train or until loaded into and after unloaded from vessels.

Sec. 5. No carrier hereunder will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classifications or tariffs unless a special agreement to do so and a stipulated value of the articles are indorsed hereon.

Sec. 6. Every party, whether principal or agent, shipping explosives or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for and indemnify the carrier against all loss or damage caused by such goods, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

Sec. 7. The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property; but, except in those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid. The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor shall not be liable for such charges. Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.

Sec. 8. If this bill of lading is issued on the order of the shipper, or his agent, in exchange or in substitution for another bill of lading, the shipper's signature to the prior bill of lading as to the statement of value or other wise, or election of common law or bill of lading liability, in or in connection with such prior bill of lading, shall be considered a part of this bill of lading as fully as if the same were written or made in or in connection with this bill of lading.

Sec. 9. (a) If all or any part of said property is carried by water over any part of said route, such water carriage shall be performed subject to all the terms and provisions of, and all the exemptions from liability contained in, the Act of the Congress of the United States, approved on February 13, 1893, and entitled "An act relating to the navigation of vessels, etc.," and of other statutes of the United States according carriers by water the protection of limited liability, and to the conditions contained in this bill of lading not inconsistent therewith or with this section.

(b) No such carrier by water shall be liable for any loss or damage resulting from any fire happening to or on board the vessel, or from explosion, bursting of boilers or breakage of shafts, unless caused by the design or neglect of such carrier.

(c) If the owner shall have exercised due diligence in making the vessel in all respects seaworthy and properly manned, equipped, and supplied, no such carrier shall be liable for any loss or damage resulting from the perils of the lakes, seas, or other waters, or from latent defects in hull, machinery, or appurtenances whether existing prior to, at the time of, or after sailing, or from collision, stranding, or other accidents of navigation, or from prolongation of the voyage. And, when for any reason it is necessary, any vessel carrying any or all of the property herein described shall be at liberty to call at any port or ports, in or out of the customary route, to tow and be towed, to transfer trans-ship, or lighter, to load and discharge goods at any time, to assist vessels in distress, to deviate for the purpose of saving life or property, and for docking and repairs. Except in case of negligence such carrier shall not be responsible for any loss or damage to property if it be necessary or is usual to carry the same upon deck.

(d) General average shall be payable according to York-Antwerp Rules, 1890, and, as to any matter not therein provided for, according to the law and usage of the port of New York. If the owners shall have exercised due diligence to make the vessel in all respects seaworthy and properly manned, equipped, and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from faults or errors in navigation, or in the management of the vessel, or from any latent or other defects in the vessel, her machinery or appurtenances, or from unseaworthiness, whether existing at the time of shipment or at the beginning of the voyage (provided the latent or other defects or the unseaworthiness was not discoverable by the exercise of due diligence), the shippers, consignees and / or owners of the cargo shall nevertheless pay salvage and any special charges incurred in respect of the cargo, and shall contribute with the shipowner in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred for the common benefit or to relieve the adventure from any common peril.

(e) If the property is being carried under a tariff which provides that any carrier or carriers party thereto shall be liable for loss from perils of the sea, then as to such carrier or carriers the provisions of this section shall be modified in accordance with the tariff provisions, whose shall be regarded as incorporated into the conditions of this bill of lading.

(f) The term "water carriage" in this section shall not be construed as including lighterage in or across rivers, harbors, or lakes, when performed by or on behalf of rail carriers.

Sec. 10. Any alteration, addition, or erasure in this bill of lading which shall be made without the special notation hereon of the agent of the carrier issuing this bill of lading, shall be without effect, and this bill of lading shall be enforceable according to its original tenor.

complainant's place of business in Illinois to the purchaser's place of business in such other state or country. In the case of each such offer or order, and in the performance of such contract so made, the complainant delivered the goods packed and marked with the purchaser's address to a common carrier at one or the other of the complainant's places of business in Illinois, and entered into a contract with the carrier evidenced by a bill of lading or shipping receipt (in the forms hereto attached and hereby made a part hereof, marked Exhibit C and Exhibit D) by which [fol. 29] the common carrier agreed to deliver the goods at the address of the purchaser in such other state or country than Illinois. In the case of each such offer or order this was done pursuant to and in fulfillment of such provisions of said contract between the complainant and the purchaser. In pursuance of the agreement between the complainant and the common carrier the goods were then transported across the state lines of the State of Illinois and into another or other state or country and delivered by the carrier to the purchaser in such states and countries other than Illinois.

Western Cartridge Company, By J. L. Donnelly, Secretary.

Duly sworn to by J. L. Donnelly. Jurat omitted in printing.

[File endorsement omitted.]

(Here follow Exhibits A, B, C, and D, side folios 30, 31, 32, 32a, 33, 33a, 33b and 33c)

[fols. 34 & 35] IN CIRCUIT COURT OF SANGAMON COUNTY

MINUTE ENTRIES

Mar. 1, 1928.

Order of Court: "It is ordered by the Court that all causes motions, etc., not otherwise and finally disposed of, be continued to the next term of this Court."

* * * * * * *

"It is ordered that Court adjourn until Court in Course."

[fols. 36 & 37] April 26, 1928.

Order of Court: "It is ordered by the Court that all causes, motions, etc., not otherwise and finally disposed of, be continued to the next term of this Court."

* * * * * * *

"It is ordered that Court adjourn until Court in Course."

[fol. 38] Minute entry of argument and submission June 9, 1928, omitted in printing.

[fol. 39] In Circuit Court of Sanamon County

Gen. No. 48183

Western Cartridge Company, a Corporation, Complainant,

vs.

Louis L. Emmerson, as Secretary of State of the State of Illinois, Defendant

Bill for Injunction

Decree—Filed June 28, 1928

Now on this day comes the complainant, Western Cartridge Company, a Corporation, by Fyffe & Clarke, its solicitors, and the defendant, Louis L. Emmersan, as Secretary of State of the State of Illinois, by the Attorney General of said State, his solicitor, and this cause having come on to be heard upon the bill of complaint herein and the answer of the defendant thereto and the statement of facts made by the complainant, to be taken and considered as evidence herein, pursuant to the stipulation between the said parties filed herein, and the Court having heard the arguments of the respective solicitors thereon, and being now fully advised in the premises, upon consideration [fol. 40] thereof, finds that the equities of this cause are with the defendant, and that the temporary injunction hereto-

fore entered herein should be dissolved, and that the bill of complaint herein should be dismissed for want of equity.

The Court doth therefore order, adjudge and decree that the temporary injunction heretofore issued herein be and the same is hereby set aside and dissolved, and that the bill of complaint be and the same is hereby dismissed for want of equity, and that the defendant recover his costs expended herein and that execution issue therefor.

To which order and ruling of the Court, the complainant, by its solicitors duly excepts and from which the complainant prays an appeal herein to the Supreme Court of the State of Illinois, which is hereby granted upon condition that the complainant file its appeal bond herein in the sum of Three Hundred Dollars ($300.00), with surety to be approved by the Clerk of this Court within thirty days from this date and its bill of exceptions or certificate of evidence within sixty days from this date; and it is further ordered that the temporary injunction heretofore entered herein be continued in force pending the appeal of this cause, as aforesaid.

Enter:

Chas. G. Briggle, Judge.

[File endorsement omitted.]

[fols. 41 & 42] Bond on appeal for $300.00, approved and filed July 25, 1928, omitted in printing.

[fol. 43] In Circuit Court of Sangamon County

[Title omitted]

Præcipe for Transcript of Record—Filed Aug. 6, 1928

To Hon. R. G. Moore, Clerk of Circuit Court of Sangamon County:

Will you please prepare a transcript of the whole record in the above entitled cause.

Fyffe & Clarke, Solicitors for Complainant.

[File endorsement omitted.]

[fol. 44] In Circuit Court of Sangamon County

In Chancery

[Title omitted]

Certificate of Evidence and Order Settling Same—Filed Aug. 3, 1928

Be it remembered and certified, that on the hearing of this cause on the 9th day of June, A. D. 1928, upon the Bill of Complaint, answer to said bill, and the stipulation of the parties, the complainant introduced the following stipulation of the parties and statement of facts; to-wit:

[File endorsement omitted]

[fol. 45] [Title omitted]

Stipulation of Parties

It is hereby stipulated and agreed by and between the parties to the above entitled cause, by their respective solicitors, that the statement of facts made by the complainant hereto attached and verified by the affidavit of its officer having personal knowledge of such facts, or that they are so shown by the books and records of the complainant, may be taken and considered as evidence of such facts presented in behalf of the complainant, in lieu of the introduction of the testimony of witnesses and documents mentioned in regard to the facts shown by such statement, for all purposes for which such facts may be competent evidence under the pleadings herein.

Fyffe & Clarke, Solicitors for Complainant. Oscar L. Carlstrom, Attorney General, Solicitor for Defendant. B. L. Catron, Assistant Attorney General, of Counsel.

[fol. 46] Statement of Facts

The complainant in the above entitled cause states that it is engaged in the business of the manufacture and sale of small arms ammunition and brasses; that its principal

office is located at East Alton, Illinois, and that such branch offices at which Illinois business is transacted are located at Springfield, Illinois; that the places of location of its factories connected with such business are at East Alton and Springfield, Illinois.

That the total business of complainant in the calendar year 1926 was $11,670,925.51, and that of that total business transacted $9,751,042.78 thereof was and was transacted as follows:

Persons and corporations located in other states and countries than Illinois sent offers to purchase goods or orders for goods from their respective places of business in such other states and countries than Illinois to the complainant at its place of business at East Alton, Illinois. Such offers to purchase or orders were generally but not always in the form of Exhibit A or Exhibit B hereto attached and hereby made a part hereof, and in all cases in which such offers or orders were not in such form they were in substantially such form. All of said offers to purchase or orders provided for shipment f. o. b. one or the other of the aforesaid factories of the complainant in Illinois, and provided for shipment from one or the other of said factories of the complainant in Illinois to the purchasers respective places of business in such other states or countries. In the case [fols. 47 & 48] of each of such offers or orders the complainant transmitted a written acceptance of the offer or order from the complainant's place of business in Illinois to the purchaser's place of business in such other state or country. In the case of each such offer or order, and in the performance of such contract so made, the complainant delivered the goods packed and marked with the purchaser's address to a common carrier at one or the other of the complainant's places of business in Illinois, and entered into a contract with the carrier evidenced by a bill of lading or shipping receipt (in the forms hereto attached and hereby made a part hereof marked Exhibit C and Exhibit D) by which the common carrier agreed to deliver the goods at the address of the purchaser in such other state or country than Illinois. In the case of each such offer or order this was done pursuant to and in fulfillment of such provisions of said contract between the complainant and the purchaser. In pursuance of the agreement between the complainant and the common carrier the goods were then

transported across the state lines of the State of Illinois and into another or other state or country and delivered by the carrier to the purchaser in such states and countries other than Illinois.

Western Cartridge Company, by J. L. Donnelly, Secretary.

Duly sworn to by J. L. Donnelly. Jurat omitted in printing.

(Here follow Exhibits A, B, C, and D, side folios 49, 50, 51, 52, and 52a)

[fol. 53] And forasmuch as the matters and things hereinbefore set forth do not otherwise appear of record, the Complainant tenders this its Certificate of Evidence and prays that the same may signed and sealed by the Judge of this Court pursuant to the Statute in such case made and provided; which is accordingly done this 3rd day of August, A. D. 1928.

Chas. G. Briggle, Judge. (Seal.)

[fol. 54] In Circuit Court of Sangamon County

[Title omitted]

Stipulation re Certificate of Evidence

It is hereby stipulated and agreed between the parties hereto by their respective solicitors that the original certificate of evidence be incorporated in the transcript of record in lieu of a copy thereof.

Fyffe & Clarke, Solicitors for Complainant. Oscar E. Carlstrom, Attorney General, Solicitors for Defendant. B. L. Catron, Assistant Attorney General.

EXHIBIT "A"

(A)

Western Cartridge Company

East Alton, Illinois, U. S. A.

Ammunition Order

Date.....

DISCOUNTS AND QUANTITY ON ORDER

LOADED SHELLS		CARTRIDGES	
Xpert	M.....	22 Shorts (Bail)	M.....
Super-X	M.....	Other Rim Fire	M.....
Field	M.....	Center Fire	M.....
Record	M.....		
New Chief	M.....		
Terms		Terms	

NOTE—

This order is placed at prices and terms stated herein and is subject to acceptance by the Company.

Verbal agreements between buyer and salesman will not be recognized.

In the event of the insolvency of the buyer, or sale, or transfer of the business of the buyer, this agreement may, at the option of the company, be rescinded.

All agreements are contingent upon strikes, floods, fires, accidents or other conditions beyond the control of the Company.

Ship To.....

.....

When..... Route.....

Quantity	Gauge	Shells	Drams Powder	Kind of Powder	Ounces Shot	Size of Shot		List per M	
						Drop	Chilled		

When..... Route.....

Quantity	Gauge	Shells	Drams Powder	Kind of Powder	Ounces Shot	Size of Shot		List per M	
						Drop	Chilled		
								$	
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Representative..... Buyer.....

EXHIBIT "B"

WESTERN CARTRIDGE COMPANY

EAST ALTON, ILLINOIS

No._____ **Date**_____

Ship to_____

Town_____ **State**_____ **When**_____

Route_____ **Terms:**_____

NOTE:—This order is placed at prices and terms stated herein and is subject to acceptance by the Company. Verbal agreements between buyer and salesman will not be recognized. In the event of the insolvency of the buyer, or sale, or transfer of the business of the buyer, this agreement may, at the option of the company, be rescinded. All agreements are contingent upon strikes, floods, fires, accidents or other conditions beyond the control of the company.

QUANTITY	GAUGE	SHELL, POWDER AND SPECIFICATION	PRICE	
M				
M				
M				
M				
M				
M				
M				
M				
M				
M				
M				
M				
M				

For Shipment Through_____ **Jobber**

SALESMAN BUYER

PRICES AND TERMS ACCEPTED

(D)

EXHIBIT "C"

AMERICAN RAILWAY EXPRESS CO.

ORIGINAL—NOT NEGOTIABLE

AT EAST ALTON, ILL., _____ 192__

From **Western Cartridge Co.**

The following described articles to be forwarded to consignee and destination as given below, subject to the terms and conditions of the Uniform Express Receipt prescribed by the Interstate Commerce Commission, and in effect on the date of shipment.

06639

CONSIGNED TO _____

STREET ADDRESS _____

DESTINATION _____ STATE _____ COUNTY _____

No. Packages	DESCRIPTION OF ARTICLES, SPECIAL MARKS AND EXCEPTIONS	*WEIGHT (Sub. to Cor.)
	Cases Small Arms Ammunition (Loaded Paper Shells)	
	" " " " (Metallic Loaded Cartridges)	
	" " " Primers	
	" Shot	
	Barrels Clay Targets	
	Cases Target Traps	
	" Trap Repairs	
	" Sheet Brass, Not Perforated	
	" " Bronze " "	
	" " Nickel Silver, Not Perforated	
	" Brass Ferrules	
	" " Blanks, Unfinished Shapes, N. O. I. B. N.	
	" " Articles, N. O. I. B. N.	
	" Screw Shells (For Lamp Sockets)	
	" Lawn Sprinklers	
	Packages Advertising Matter (Described)	
	Cases	

PREPAID	COLLECT	C. O. D.	CHARGES	
		$ _____	Amt. $ _____	Value herein declared by shipper to be _____

WESTERN CARTRIDGE CO., Shipper

Per _____ 1 _____ For the Express Co.

290964 BUSINESS UNARCO SYSTEMS, CHICAGO

(Uniform Domestic Straight Bill of Lading adopted by Carriers in Official, Southern and Western Classification territories, March 12, 1922.)
(Prescribed by the Interstate Commerce Commission.)

UNIFORM STRAIGHT BILL OF LADING—ORIGINAL—NOT NEGOTIABLE

RECEIVED, subject to the classifications and tariffs in effect on the date of the issue of this Bill of Lading.

At East Alton, Ill., _____ 192__ FROM **WESTERN CARTRIDGE CO.**

_____ Company Agent's No. _____ Shipper's No. 08978

the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

(Mail or street address of consignee—For purposes of notification only.)

Consigned to _____

Destination _____ State of _____ County of _____

Route _____ Car Initial _____ Car No. _____

No. Packages	DESCRIPTION OF ARTICLES, SPECIAL MARKS AND EXCEPTIONS	*Weight (Subj. to Corr.)	Class or Rate	Ck. Col.
	Cases Small Arms Ammunition (Loaded Paper Shells)			
	" " " " (Metallic Loaded Cartridges)			
	" " " Primers			
	" Shot			
	Gunnies (Bags) Shot			
	Barrels Clay Targets			
	Cases Target Traps			
	" Sheet Brass, Not Perforated .005" and thicker			
	" Sheet Bronze, Not Perforated .005" and thicker			
	" Sheet Nickel, (German) Silver Not Perforated .005" and thicker			
	" Sheet Brass, Perforated .005" and thicker			
	" Brass Ferrules			
	" Brass Blanks (Unfinished Shapes)			
	" Screw Shells (for Lamp Sockets)			
	" Lawn Sprinklers			
	" Brass Articles (N. O. S.)			
	Cases			
	Barrels			

If this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges. (See section 7 of conditions.)

WESTERN CARTRIDGE CO.

Per _____

If charges are to be prepaid, write or stamp here, "To be Prepaid."

Received $ _____ to apply in prepayment of the charges on the property described herein.

Agent or Cashier.

Per _____

(The signature here acknowledges only the amount prepaid.)

Charges Advanced: $ _____

1

*If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is "carrier's or shipper's weight."
NOTE—Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property.

The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding _____ per _____

This is to certify that the above articles are properly described by name and are packed and marked and are in proper condition for transportation according to the regulations prescribed by the Interstate Commerce Commission.

Shipper's imprint in lieu of stamp; not a part of Bill of Lading approved by the Interstate Commerce Commission.

WESTERN CARTRIDGE CO., Shipper, Per _____ Agent _____ Per _____

Permanent Post-Office Address of Shipper: EAST ALTON, ILL.

274349 [illegible]

CONTRACT TERMS AND CONDITIONS

Sec. 1. (a) The carrier or party in possession of any of the property herein described shall be liable as at common law for any loss thereof or damage thereto except as hereinafter provided.

(b) No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, the authority of law, or the act or default of the shipper or owner, or for natural shrinkage. The carrier's liability shall be that of warehouseman, only, for loss, damage, or delay caused by fire occurring after the expiration of the free time allowed by tariffs lawfully on file (such free time to be computed as therein provided) after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination, or tender of delivery of the property to the party entitled to receive it, has been made. Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon the request of the shipper, owner, or party, entitled to make such request, or resulting from a defect or vice in the property, or for country damage to cotton, or from riots or strikes.

(c) In case of quarantine the property may be discharged at risk and expense of owners into quarantine depot or elsewhere, as required by quarantine regulations or authorities, or for the carrier's dispatch at nearest available point in carrier's judgment, and in any such case carrier's responsibility shall cease when property is so discharged, or property may be returned by carrier at owner's expense to shipping point, earning freight both ways. Quarantine expenses of whatever nature or kind upon or in respect to property shall be borne by the owners of the property or be a lien thereon. The carrier shall not be liable for loss of damage occasioned by fumigation or disinfection or other acts required or done by quarantine regulations or authorities even though the same may have been done by carrier's officers, agents, or employees, nor for detention, loss, or damage of any kind occasioned by quarantine or the enforcement thereof. No carrier shall be liable, except in case of negligence, for any mistake or inaccuracy in any information furnished by the carrier, its agents, or officers, as to quarantine laws or regulations. The shipper shall hold the carriers harmless from any expense they may incur, or damages they may be required to pay, by reason of the introduction of the property covered by this contract into any place against the quarantine laws or regulations in effect at such place.

Sec. 2. (a) No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch. Every carrier shall have the right in case of physical necessity to forward said property by any carrier or route between the point of shipment and the point of destination. In all cases not prohibited by law, where a lower value than actual value has been represented in writing by the shipper or has been agreed upon in writing as the released value of the property as determined by the classification or tariffs upon which the rate is based, such lower value plus freight charges if paid shall be the maximum amount to be recovered, whether or not such loss or damage occurs from negligence.

(b) Claims for loss, damage, or injury to property must be made in writing to the originating or delivering carrier or carriers issuing this bill of lading within six months after delivery of the property (or, in case of export traffic, within nine months after delivery at port of export) or, in case of failure to make delivery, then within six months (or nine months in case of export traffic) after a reasonable time for delivery has elapsed; provided that if such loss, damage, or injury was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery. Suits for loss, damage, injury, or delay shall be instituted only within two years and one day after delivery of the property, or in case of failure to make delivery, then within two years and one day after a reasonable time for delivery has elapsed: Provided, That in case the claim on which suit is based was made in writing within six months, or nine months in case of export traffic (whether or not filing of such claim is required as a condition precedent to recovery), suit shall be instituted not later than two years and one day after notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice.

(c) Any carrier or party liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance: Provided, That the carrier reimburse the claimant for the premium paid thereon.

Sec. 3. Except where such service is required as the result of carrier's negligence, all property shall be subject to necessary cooperage and baling at owner's cost. Each carrier over whose route cotton or cotton linters is to be transported hereunder shall have the privilege, at its own cost and risk, of compressing the same for greater convenience in handling or forwarding, and shall not be held responsible for deviation or unavoidable delays in procuring such compression. Grain in bulk consigned to a point where there is a railroad, public or licensed elevator, may (unless otherwise expressly noted herein, and then if it is not promptly unloaded) be there delivered and placed with other grain of the same kind and grade without respect to ownership (and prompt notice thereof shall be given to the consignor), and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

Sec. 4. (a) Property not removed by the party entitled to receive it within the free time allowed by tariffs, lawfully on file (such free time to be computed as therein provided), after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination has been made, may be kept in vessel, car, depot, warehouse or place of delivery of the carrier, subject to the tariff charge for storage and to carrier's responsibility as warehouseman, only, or at the option of the carrier, may be removed to and stored in a public or licensed warehouse at the place of delivery or other available place, at the cost of the owner, and there held without liability on the part of the carrier and subject to lien for all freight and other lawful charges, including a reasonable charge for storage.

(b) Where nonperishable property which has been transported to destination hereunder is refused by consignee or the party entitled to receive it, or said consignee or party entitled to receive it fails to receive it within 15 days after notice of arrival shall have been duly sent or given, the carrier may sell the same at public auction to the highest bidder, at such place as may be designated by the carrier: Provided, That the carrier shall have first mailed, sent, or given to the consignor notice that the property has been refused or remains unclaimed, as the case may be, and that it will be subject to sale under the terms of the bill of lading if disposition be not arranged for, and shall have published notice containing a description of the property, the name of the party to whom consigned, or, if shipped order notify, the name of the party to be notified, and the time and place of sale, once a week for two successive weeks, in a newspaper of general circulation at the place of sale or nearest place where such newspaper is published: Provided, That 30 days shall have elapsed before publication of notice of sale after said notice that the property was refused or remains unclaimed was mailed, sent, or given.

(c) Where perishable property which has been transported hereunder to destination is refused by consignee or party entitled to receive it, or said consignee or party entitled to receive it shall fail to receive it promptly, the carrier may, in its discretion, to prevent deterioration or further deterioration, sell the same to the best advantage at private or public sale: Provided, That if time serves for notification to the consignor or owner of the refusal of the property or the failure to receive it and request for disposition of the property, such notification shall be given, in such manner as the exercise of due diligence requires, before the property is sold.

(d) Where the procedure provided for in the two paragraphs last preceding is not possible, it is agreed that nothing contained in said paragraphs shall be construed to abridge the right of the carrier at its option to sell the property under such circumstances and in such manner as may be authorized by law.

(e) The proceeds of any sale made under this section shall be applied by the carrier to the payment of freight, demurrage, storage, and any other lawful charges and the expense of notice, advertisement, sale, and other necessary expenses and of caring for and maintaining the property, if proper care of the same requires special expense, and should there be a balance it shall be paid to the owner of the property sold hereunder.

(f) Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed freight agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and, except in case of carrier's negligence, when received from or delivered to such stations, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from locomotive or train or until loaded into and after unloaded from vessels.

Sec. 5. No carrier hereunder will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classifications or tariffs unless a special agreement to do so and a stipulated value of the articles are indorsed hereon.

Sec. 6. Every party, whether principal or agent, shipping explosives or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for and indemnify the carrier against all loss or damage caused by such goods, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

Sec. 7. The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property; but, except in those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid. The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor shall not be liable for such charges. Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.

Sec. 8. If this bill of lading is issued on the order of the shipper, or his agent, in exchange or in substitution for another bill of lading, the shipper's signature to the prior bill of lading as to the statement of value or other wise, or election of common law or bill of lading liability, in or in connection with such prior bill of lading, shall be considered a part of this bill of lading as fully as if the same were written or made in or in connection with this bill of lading.

Sec. 9. (a) If all or any part of said property is carried by water over any part of said route, such water carriage shall be performed subject to all the terms and provisions of, and all the exemptions from liability contained in, the Act of the Congress of the United States, approved on February 13, 1893, and entitled "An act relating to the navigation of vessels, etc.," and of other statutes of the United States according carriers by water the protection of limited liability, and to the conditions contained in this bill of lading not inconsistent therewith or with this section.

(b) No such carrier by water shall be liable for any loss or damage resulting from any fire happening to or on board the vessel, or from explosion, bursting of boilers or breakage of shafts, unless caused by the design or neglect of such carrier.

(c) If the owner shall have exercised due diligence in making the vessel in all respects seaworthy and properly manned, equipped, and supplied, no such carrier shall be liable for any loss or damage resulting from the perils of the lakes, seas, or other waters, or from latent defects in hull, machinery, or appurtenances whether existing prior to, at the time of, or after sailing, or from collision, stranding, or other accidents of navigation, or from prolongation of the voyage. And, when for any reason it is necessary, any vessel carrying any or all of the property herein described shall be at liberty to call at any port or ports, in or out of the customary route, to tow and be towed, to transfer, trans-ship, or lighter, to load and discharge goods at any time, to assist vessels in distress, to deviate for the purpose of saving life or property, and for docking and repairs. Except in case of negligence such carrier shall not be responsible for any loss or damage to property if it be necessary or is usual to carry the same upon deck.

(d) General average shall be payable according to York-Antwerp Rules, 1890, and, as to any matter not therein provided for, according to the law and usage of the port of New York. If the owners shall have exercised due diligence to make the vessel in all respects seaworthy and properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from faults or errors in navigation, or in the management of the vessel, or from any latent or other defects in the vessel, her machinery or appurtenances, or from unseaworthiness, whether existing at the time of shipment or at the beginning of the voyage (provided the latent or other defects or the unseaworthiness was not discoverable by the exercise of due diligence by the shippers, consignees and / or owners of the cargo shall nevertheless pay salvage and any special charges incurred in respect of the cargo, and shall contribute with the shipowner in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred for the common benefit or to relieve the adventure from any common peril.

(e) If the property is being carried under a tariff which provides that any carrier or carriers party thereto shall be liable for loss from perils of the sea, then as to such carrier or carriers the provisions of this section shall be modified in accordance with the tariff provisions, which shall be regarded as incorporated into the conditions of this bill of lading.

(f) The term "water carriage" in this section shall not be construed as including lighterage in or across rivers, harbors, or lakes, when performed by or on behalf of rail carriers.

Sec. 10. Any alteration, addition, or erasure in this bill of lading which shall be made without the special notation hereon of the agent of the carrier issuing this bill of lading, shall be without effect, and this bill of lading shall be enforceable according to its original tenor.

[fol. 55] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 56] IN SUPREME COURT OF ILLINOIS

WESTERN CARTRIDGE COMPANY, a Corporation, Appellant,

vs.

LOUIS L. EMMERSON, as Secretary of State of the State of Illinois, Defendant

Appeal from Circuit Court of Sangamon County

ASSIGNMENT OF ERRORS

And now comes the appellant, Western Cartridge Company, a corporation, by its solicitors and submits the following assignment of errors on which it relies on the prosecution of its appeal.

1. The Circuit Court erred in finding that the equities of the cause were with the defendant.

2. The Circuit Court erred in finding that the bill of complaint should be dismissed for want of equity.

3. The Circuit Court erred in finding that the temporary injunction heretofore entered by it should be dissolved.

4. The Circuit Court erred in refusing to hold that the annual license fee for the privilege of doing business in Illinois for the year commencing July 1, 1927, assessed against the complainant by the defendant was illegal, invalid and without authority of law.

5. The Circuit Court erred in refusing to hold that the sum of $1,328.81 of the complainant's annual license fee for the privilege of doing business in Illinois was assessed by [fol. 57] the defendant illegally and without authority of law.

6. The Circuit Court erred in refusing to hold that the license fee for the privilege of doing business in Illinois for the year commencing July 1, 1927, assessed against the

complainant by the defendant constituted a burden on interstate commerce in violation of the Commerce Clause of the Federal Constitution and was consequently invalid.

7. The Circuit Court erred in refusing to hold that Section 105 of the General Corporation Act of Illinois does not authorize the inclusion of interstate business from places in Illinois to points in other States as business transacted in Illinois in determining the basis for computing the license fee imposed on foreign corporations for the privilege of doing business in Illinois.

8. The Circuit Court erred in failing to hold that the inclusion by the defendant of interstate business from places in Illinois to points without the State as business transacted in Illinois in determining the basis for computing the annual license fee of the complainant for the privilege of doing business in Illinois was contrary to the provisions of Section 105 of the General Corporation Act and therefore illegal, invalid and without authority of law.

9. The Circuit Court erred in failing to hold that Section 105 of the General Corporation Act of Illinois is invalid, unconstitutional and void in that it violates the Commerce Clause of the Federal Constitution by authorizing the in-
[fol. 58] clusion of interstate business as business transacted in Illinois, in determining the basis for computing the annual license fee imposed on foreign corporations for the privilege of doing business in Illinois.

10. The Circuit Court erred in failing to hold that Section 105 of the General Corporation Act of Illinois is invalid, unconstitutional and void for the reason that it deprives corporations of their property without due process of law, contrary to the provisions of the Constitution of the State of Illinois and of the Fourteenth Amendment to the Constitution of the United States.

11. The Circuit Court erred in failing to hold that Section 105 of the General Corporation Act as amended by the Act of May 12, 1927, is invalid and ineffectual in that the said amendatory Act purporting to amend said Section 105 was of no effect in amending an invalid section of the Statute.

12. The Circuit Court erred in failing to find that the franchise tax paid by the complainant to the defendant was illegally collected and should have been returned to the complainant.

13. The Circuit Court erred in failing to hold that that part of the franchise tax or license fee paid by the complainant to the Secretary of State, which was solely based upon and attributable to transactions in interstate commerce, was illegally collected and should have been returned by the defendant to the complainant.

14. The Circuit Court erred in refusing to grant a permanent injunction restraining the defendant from turning over to the said Treasurer the franchise tax collected by him from the complainant and restraining him from enforcing the penalties provided for by the General Corporation Act against the complainant.

[fol. 59] 15. The Circuit Court erred in refusing to grant a permanent injunction restraining the defendant from turning over to the State Treasurer the sum of $1,328.81 of the license fee paid by the complainant and restraining him from enforcing any penalties against the complainant.

16. The Circuit Court erred in dismissing the bill of complaint for want of equity.

17. The Circuit Court erred in dissolving the temporary injunction heretofore ordered by it.

Respectfully submitted.

Fyffe & Clarke, Solicitors for Appellant.

[fol. 60] Minute entry of submission October 17, 1928, omitted in printing.

[fol. 61] IN SUPREME COURT OF ILLINOIS

No. 19171

WESTERN CARTRIDGE COMPANY, a Corporation, Appellant,

vs.

LOUIS L. EMMERSON, as Secretary of State of the State of Illinois, Appellee

Appeal from Circuit Court Sangamon

OPINION—Filed April 20, 1929

[fol. 62] Mr. Chief Justice DEYOUNG delivered the opinion of court:

The Western Cartridge Company, a corporation organized under the laws of Delaware and licensed to do business in this State, filed its bill of complaint in the circuit court of Sangamon county against Louis L. Emmerson, Secretary of State, to enjoin him from paying to the State Treasurer the sum of money which he collected from the complainant as its annual franchise tax for the year beginning July 1, 1927, or, in any event, to enjoin such payment of the portion of the tax attributable to what the complainant denominated as its interstate business. A temporary injunction against the deposit of the money with the State Treasurer was granted. A hearing upon the bill, the answer of the defendant and an agreed statement of facts resulted in the rendition of a decree dismissing the bill for want of equity. The complainant prosecutes this appeal from that decree. The court ordered that the temporary injunction should continue in force during the pendency of the appeal.

Appellant is engaged in the manufacture and sale, among other things, of small-arms ammunition. Its principal office and factory are located at East Alton, Illinois. It has a branch office and factory at Springfield, in this State. Appellant receives at its principal office, upon forms provided by it, orders for its manufactured products from persons and corporations in Illinois and elsewhere. Written acceptances of these orders are sent to the buyers. The order forms provide for the delivery of the goods to the means of conveyance at one or the other of appellant's factories in this State free of charge and thence their ship-

ment to the buyers' respective places of business. The goods sold are packed, marked with the buyers' names and addresses and delivered to common carriers at appellant's factories. The contracts with the carriers are evidenced by bills of lading or shipping receipts, and in the performance of these contracts the carriers transport the goods to their respective destinations, not only in Illinois but also in other States and in foreign countries.

The license fee or franchise tax of which appellant complains was collected pursuant to section 105 of the [fol. 63] general Corporation act as amended by the act approved May 12, 1927, (Laws of 1927, p. 358; Cahill's Stat. 1927, p. 656; Smith's Stat. 1927, pp. 716, 717;) which reads: "Each corporation for profit, including railroads, except insurance companies, heretofore or hereafter organized under the laws of this State or admitted to do business in this State, and required by this act to make an annual report, shall pay an annual license fee or franchise tax to the Secretary of State of five cents on each one hundred dollars of the proportion of its issued capital stock, or amount to be issued at once, represented by business transacted and property located in this State, but in no event shall the amount of such license fee or franchise tax be less than that required by this act of corporations having no property or business in this State. In the event that the corporation has stock of no par value, its shares, for the purpose of fixing such fee, shall be taken and considered at the amount of the consideration received or to be received by such corporation for such shares." In compliance with this section appellant filed its annual report in the office of the Secretary of State. It set forth in the report that its capital stock had a par value of $5,701,800; that it possessed property valued at $6,924,804.92, of which $6,894,903.27 was situated in Illinois; that its business for the year 1926 aggregated $11,670,925.51, of which $1,919,-882.73 represented goods sold and delivered in this State, and that the balance, or $9,751,042.78, reported as interstate commerce, constituted the total of shipments made to customers outside of the State. In computing appellant's franchise tax the Secretary of State considered all the business done by appellant, according to its report, as having been transacted in Illinois, and based the tax on the pro-

portion of its issued capital stock represented by the business so transacted and its property located in this State. The inclusion in the computation of the shipments made by appellant to customers outside of Illinois increased the franchise tax to the extent of $1,328.21. The whole tax, including this sum, amounted to $2,808.03, and it was paid by appellant. The payment was made under protest, not only with respect to the whole tax but also the portion specifically mentioned.

Appellant's contention for a reversal of the decree is that the inclusion of the business which is reported as interstate in the computation of the license fee or franchise tax for the privilege of doing business in this State is in- [fol. 64] consistent with the provisions of section 105 of the general Corporation act and that it is a direct and illegal burden on interstate commerce.

Section 105 of the general Corporation act, to the extent that it prescribes the method of determining the license fee or franchise tax which a foreign corporation doing business in this State shall pay, is similar to section 5b of the Foreign Corporation act, which became effective on July 1, 1917, (Laws of 1917, p. 306,) and which provided: "It shall be the duty of the Secretary of State to propound interrogatories from time to time to officers of such foreign corporations doing business in this State to ascertain the proportion of capital stock actually being represented by property located and business transacted in the State of Illinois, which proportion shall be determined by averaging the percentage of the total business of the corporation transacted in Illinois with the percentage of the total tangible property located in this State." This section was construed and applied in American Can Co. v. Emmerson, 288 Ill. 289. It was there held that while the State may not regulate or impose burdens upon interstate commerce, yet where the circumstances are such as to indicate no purpose or necessary effect to burden such commerce, it may require a license fee based upon the proportion of a foreign corporation's capital stock represented by its property located and business transacted in the State, and that section 5b did not discriminate against foreign corporations and in favor of domestic corporations of like character.

Subsequently, in Hump Hairpin Manf. Co. v. Emmerson, 293 Ill. 387, it appeared that the company, a foreign

corporation, had its factory, manufactured its products and accepted orders for them and completed its contracts of sale in this State. Following the decision in American Can Co. v. Emmerson, supra, this court held that the whole of the corporation's capital stock was represented by the property located and the business transacted in Illinois although approximately nine-tenths of its manufactured products were shipped to customers in other States, and that a license fee under section 5b of the Foreign Corporation act, based on the entire capital stock of the corporation, was not a tax on interstate commerce. To review that decision the corporation prosecuted a writ of error from the Supreme Court of the United States in Hump Hairpin Manf. Co. v. Emmerson, 258 U. S. 290. The plaintiff in error contended there, as appellant does here, that, notwith-[fol. 65] standing the manner in which the company conducted its business, that portion which was done with residents of States other than Illinois constituted interstate commerce, and that to include it in the company's business transacted in this State for the purpose of ascertaining the latter's percentage of the whole rendered the act under which the computation was made unconstitutional because the tax so assessed was a burden upon interstate commerce. In denying the contention and affirming the judgment of this court the Supreme Court of the United States said that while a State might not use its taxing power to regulate or burden interstate commerce, it was settled that a State excise tax which affected such commerce, not directly but only incidentally and remotely, might be valid where it was clear that it was not imposed with the covert purpose or with the effect of defeating Federal constitutional rights; that taxes had been repeatedly sustained where the proceeds of interstate commerce were considered in the process of determining the amount of a fund, not wholly derived from such commerce, to be subjected to assessment; that the act in question was not a disguised attempt to tax interstate commerce but that its purpose plainly was to differentiate State from interstate business and to impose the tax only on the former; that, construed with other statutes, the act accorded equal treatment to foreign and domestic corporations and that property beyond the jurisdiction of the State was not taxed; that to require foreign corporations to pay for the privilege of doing business in a State was a familiar

and often-approved form of taxation; that the tax assessed did not impose any direct or substantial burden upon interstate commerce, and that the assessment, so far as such commerce was concerned, was incidental, remote and unimportant, and therefore constitutional.

The decision of the Supreme Court of the United States in Hump Hairpin Manf. Co. v. Emmerson, supra, is decisive of this case. Appellant's factories and offices were located, its manufacturing operations were conducted, orders for its goods were accepted and shipments of its products originated in this State exclusively. Assuming that the business done by appellant with residents of States other than Illinois was interstate business, yet the license fee or franchise tax was not directly imposed or computed upon the proceeds of interstate commerce. By the provisions of section 105 of the general Corporation act other factors necessarily enter into the calculation. All of ap- [fol. 66] pellant's business was transacted in this State, and it was properly included in the process of determining the proportion of its issued capital stock, represented by business transacted and property located in Illinois, upon which the franchise tax might be computed. Such a tax does not constitute a direct or substantial burden upon interstate commerce.

The decree of the circuit court is affirmed.

Decree affirmed.

[fol. 67] IN SUPREME COURT OF ILLINOIS

No. 19171

WESTERN CARTRIDGE COMPANY, a Corporation, Appellant,

vs.

LOUIS L. EMMERSON, as Secretary of State of the State of Illinois, Appellee

Appeal from Circuit Court Sangamon County

DECREE—April 20, 1929

And now, on this day, this cause having been argued by counsel, and the Court, having diligently examined and in-

spected as well the record and proceedings aforesaid, as the matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the decree aforesaid, is there anything erroneous, vicious or defective, and in that record there is no error;

Therefore it is considered by the Court that the decree of the Circuit Court aforesaid be affirmed in all things and stand in full force and effect, notwithstanding the said matter and things therein assigned for error. And it is further considered by the Court that the said Appellee recover of and from the said Appellant costs by him in this behalf expended, to be taxed, and that he have execution therefor.

I, Charles W. Vail, Clerk of the Supreme Court of the State of Illinois and keeper of records, files and seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

In testimony whereof I have set my hand and affixed the seal of the said Supreme Court, at Springfield, in said State, this 27th day of August, in the year of our Lord one thousand nine hundred and twenty-nine.

Charles W. Vail, Clerk of the Supreme Court.

(Seal of the Supreme Court, State of Illinois.)

[fol. 68] IN SUPREME COURT OF ILLINOIS

[Title omitted]

ORDER DENYING REHEARING—June 6, 1929

Now on this day the Court having duly considered petition for rehearing filed herein and the Court being now advised in the premises doth overrule the prayer of the petition and denies a rehearing of this cause.

[fol. 69] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 70] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 21, 1929

The petition herein for a writ of certiorari to the Supreme Court of the State of Illinois is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 34,506. Illinois Supreme Court. Term No. 375. Western Cartridge Company, petitioner, vs. Louis L. Emmerson, Secretary of State of the State of Illinois. Petition for writ of certiorari and exhibit thereto. Filed September 5, 1929. File No. 34,506.

FILE COPY

CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1929.

NO. 375

WESTERN CARTRIDGE COMPANY, a Corporation,
Petitioner,

vs.

LOUIS L. EMMERSON, Secretary of State of the State of Illinois,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS AND BRIEF IN SUPPORT THEREOF.

COLIN C. H. FYFFE,
COUNSEL FOR PETITIONER.

HAWKINS & LOOMIS CO., LAW PRINTERS, CHICAGO

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IV. The decision of Hump Hairpin Mfg. Company v. Emmerson is not applicable to the present case. The interstate commerce of petitioner was the largest element entering into the computation of the tax, and the assessment is not incidental, remote or unimportant so far as interstate commerce is concerned. 12

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1929.

No.....

WESTERN CARTRIDGE COMPANY, a Corporation,
Petitioner,

vs.

LOUIS L. EMMERSON, Secretary of State of the State of Illinois,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

MAY IT PLEASE THE COURT:

The petition of Western Cartridge Company, a corporation, respectfully shows to this honorable Court:

A.

Statement of the case.

The petitioner prays for a writ of certiorari to review an order of the Supreme Court of Illinois affirming a decree of

the Circuit Court of Sangamon County, Illinois, dismissing a bill for an injunction filed in that court by the petitioner.

The order of the Supreme Court of Illinois was entered April 20, 1929, and an order denying a petition for rehearing was entered on June 6, 1929.

The petitioner, a foreign corporation, organized under the laws of the State of Delaware and licensed to do business in Illinois, filed its bill of complaint to enjoin Louis L. Emmerson, then Secretary of State of Illinois, from paying over to the State Treasurer of Illinois the amount of the license fee collected by him from the petitioner.

This license fee was assessed and collected under Section 105 of the General Corporation Act of Illinois. This section provides:

> "Section 105. Each corporation for profit, including railroads, except insurance companies, heretofore or hereafter organized under the laws of this state or admitted to do business in this state, and required by this Act to make an annual report, shall pay an annual license fee or franchise tax to the secretary of state of five cents on each one hundred dollars of the proportion of its issued capital stock, or amount to be issued at once, represented by business transacted and property located in this state, but in no event shall the amount of such license fee or franchise tax be less than that required by this Act of corporations having no property or business in this state.
>
> In the event that the corporation has stock of no par value, its shares, for the purpose of fixing such fee, shall be taken and considered at the amount of the consideration received or to be received by such corporation for such shares."

The total property of petitioner was $6,924,804.92, of which $6,894,903.27 was located in Illinois. (R. 3.)

The total business of petitioner for the year upon which the tax was determined amounted to $11,670,925.51. Of this amount $9,751,042.78 consisted of sales of goods to customers

outside the State of Illinois; the shipments being made from Illinois to customers outside the state, pursuant to orders sent by these customers to the petitioner in Illinois. The petitioner sent a written acceptance of the offer to the customer. (R. 28.)

The business so transacted was reported by petitioner in its annual report as interstate commerce. It was regarded by the Secretary of State as "business transacted in Illinois," and was included by him in determining the proportion of petitioner's capital stock represented by property located and business transacted in Illinois.

The license fee collected from petitioner amounted to $2,808.03. If the Secretary of State had not included the interstate business of petitioner as "business transacted in Illinois" in computing the tax, the license fee would have amounted to $1,479.22. The license fee of petitioner was increased $1,328.81 by the inclusion of interstate business in computing the tax. (R. 3.)

The Circuit Court of Sangamon County dismissed the bill of complaint and the Supreme Court of Illinois affirmed the decree of the Circuit Court. The decision of the Supreme Court is reported in Vol. 335 of the Illinois Reports, page 150. It is found in the record, pp. 62 to 66. The Supreme Court of Illinois held that the decision of this Court in *Hump Hairpin Mfg. Company* v. *Emmerson,* 258 U. S. 290, was decisive of the case and that the license fee was not directly imposed or computed upon the proceeds of interstate commerce.

The license fee imposed by the Secretary of State of Illinois on your petitioner is a direct burden on the interstate commerce of your petitioner, and is in violation of Clause 3, Section 8 of Article I of the Constitution of the United States.

B.

Jurisdiction of this Court.

The jurisdiction of this Court to review by certiorari the decree entered by the Supreme Court of Illinois, affirming the decree of the Circuit Court of Sangamon County, is based on Section 237 of the Judicial Code, as amended, (U. S. Code, Title 28, Sec. 344).

C.

Reasons relied on for allowance of writ.

I.

The inclusion of interstate business of petitioner as "business transacted in Illinois" in computing the annual license fee assessed on it as a foreign corporation for the privilege of doing business in Illinois under Section 105 of the Illinois Corporation Act imposed a direct burden on the interstate commerce of petitioner contrary to the commerce clause, Clause 3, Section 8, Art. 1, of the Constitution of the United States, and the Supreme Court of Illinois erred in not so holding.

II.

The burden on the interstate commerce of the petitioner is substantial and direct. Its license fee was almost doubled by the inclusion of interstate commerce as "business transacted in Illinois." The Supreme Court of Illinois erred in holding that the tax was not directly imposed or computed on interstate commerce.

III.

The Supreme Court of Illinois erred in holding that the decision of this Court in the case of *Hump Hairpin Mfg. Company* v. *Emmerson*, 258 U. S. 290, was decisive of this case. The later decisions of this Court in *Airway Electric Appliance Corporation* v. *Day*, 266 U. S. 71; *Alpha Portland Cement Co.* v. *Massachusetts*, 268 U. S. 203, and *Cudahy Packing Company* v. *Hinkle*, 49 Sup. Ct. Rep. 204, decided February 18, 1929, are decisive.

IV.

The decision of this Court in the case of *Hump Hairpin Company* v. *Emmerson*, is not applicable to the present case. The interstate commerce of petitioner is the largest element entering into the computation of the tax, and the assessment is not incidental, remote or unimportant so far as interstate commerce is concerned.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the Supreme Court of the State of Illinois, commanding that Court to certify and send to this Court a full and complete transcript of the record and all proceedings in said Supreme Court of Illinois in said cause, and that this cause may be reviewed and determined by this Court as provided by the Acts of Congress; and that your petitioner may have such other or further relief or remedy in the premises as to this Court may seem appropriate, and that the said decree of the said Supreme Court of Illinois may be reversed by this honorable Court.

Western Cartridge Company,
Petitioner.

Colin C. H. Fyffe,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION.

I.

The inclusion of interstate business of petitioner as "business transacted in Illinois" in computing the annual license fee assessed on it as a foreign corporation for the privilege of doing business in Illinois under Section 105 of the Illinois Corporation Act imposed a direct burden on the interstate commerce of petitioner contrary to the commerce clause, Clause 3, Section 8, Article I, of the Constitution of the United States, and the Supreme Court of Illinois erred in not so holding.

The petitioner shipped its goods from Illinois to purchasers in other states pursuant to orders received from the purchasers for such goods. This course of business was interstate commerce.

Hump Hairpin Mfg. Co. v. *Emmerson*, 258 U. S. 290.
Dahnke Walker Milling Co. v. *Bondurant*, 257 U. S. 282.
Airway Electric Appliance Corp. v. *Day*, 266 U. S. 71.

This Court has held in a long line of cases that a license fee imposed on a foreign corporation for the privilege of doing business within a state is invalid if it constitutes a burden on the interstate commerce of the corporation.

Western Union Telegraph Co. v. *Kansas*, 216 U. S. 1.
Pullman Company v. *Kansas*, 216 U. S. 57.
Looney v. *Crane Company*, 245 U. S. 178.
International Paper Co. v. *Massachusetts*, 246 U. S. 135.
Airway Electric Appliance Corp. v. *Day*, 266 U. S. 71.
Cudahy Packing Co. v. *Hinkle*, 49 Sup. Ct. Rep. 204, decided February 18, 1929.

The fundamental principle laid down in all of these cases is that a state cannot require a foreign corporation, as a condition of the right to do a local business, to submit to a tax on its interstate business.

The tax imposed in this case is a tax on the interstate business of your petitioner. Over nine million dollars of interstate business is taxed as business done in Illinois. This is a burden on the interstate business of your petitioner.

II.

The burden on the interstate commerce of the petitioner is substantial and direct. Its license fee was almost doubled by the inclusion of interstate commerce as "business transacted in Illinois." The Supreme Court of Illinois erred in holding that the tax was not directly imposed or computed on interstate commerce.

Petitioner paid a license fee of $2,808.03 for the privilege of doing business in Illinois. This fee should have been based on the proportion of its capital stock represented by business transacted and property located in Illinois.

The total issued capital stock of petitioner is $5,701,800. It was assessed on $5,616,060 of this stock, which was the proportion which the Secretary of State found was represented by Illinois property and business. Petitioner paid the tax so assessed under protest.

If petitioner's interstate business amounting to $9,751,042.78 or about five-sixths of the total business, had not been included, the petitioner would have been taxed on $2,978,440 of its capital stock.

The difference between these two amounts or $2,637,620 is the part of the capital stock of petitioner represented by interstate commerce which is taxed. The tax thus based on the

stock of petitioner represented by interstate commerce is $1,328.81. This amounts to almost fifty per cent of the tax paid by petitioner.

The tax was directly computed on stock represented by interstate transactions and was increased almost fifty per cent by the inclusion of such transactions as Illinois business.

III.

The Supreme Court of Illinois erred in holding that the decision of this Court in the case of Hump Hairpin Company v. Emmerson, 258 U. S. 290, was decisive of this case.

The decision of this Court in *Hump Hairpin Mfg. Company* v. *Emmerson* is not decisive of the present case. In the *Hump Hairpin case,* this Court held:

> "The statute and the State Supreme Court both show a candid purpose to differentiate state from interstate business, and to use only the former in determining the amount of the disputed tax."
>
> * * *
>
> "The tax is not imposed directly upon the proceeds of interstate commerce, and is not computed upon it."
>
> * * *
>
> "At most, the assessment, so far as interstate commerce is concerned, is incidental, remote and unimportant."

In the later case of *Airway Electric Appliance Corporation* v. *Day,* 266 U. S. 71, this Court held that a license fee based on the authorized stock of a foreign corporation, which was engaged in interstate commerce, was invalid because it directly burdened interstate commerce. This Court said, at page 82:

> "As some of the outstanding shares are represented by plaintiff's interstate business, the application of the rate *to all the shares* or to a number greater than the total outstanding, necessarily amounts to a *tax* and *direct* burden upon all the property and business including the interstate commerce of the plaintiff." (Italics ours.)

The interstate business of the Airway Company was transacted in the same manner as that of petitioner. All of the Airway Company's property was located in Ohio. 266 U. S. 71 at 78. It manufactured its product in Ohio and sold it within the State of Ohio and in interstate commerce.

This decision is expressly applicable to the present case. This Court held that if unissued shares were taxed, interstate commerce was necessarily burdened. *A fortiori* if the tax is based on shares that are brought into the computation solely because they represent interstate commerce, interstate commerce is taxed and the tax must necessarily be invalid.

This Court has held that interstate commerce is burdened when the license tax is based on all of the shares of a foreign corporation. *Looney* v. *Crane*, 245 U. S. 178; *International Paper Co.* v. *Massachusetts*, 246 U. S. 135. It is also burdened when the tax is based on authorized stock not issued. *Airway Electric Appliance Corp.* v. *Day*, 266 U. S. 71.

In the present case, interstate commerce is burdened where the tax is based on shares directly attributable to interstate commerce. The burden is more apparent than in either of the other two classes of cases.

In all three cases the tax is based on the capital stock of the corporation. When part of the stock on which the tax is based is represented by interstate commerce, the tax burdens interstate commerce. In the present case, part of the capital stock of petitioner upon which the tax is based is expressly represented by interstate commerce.

In case of a tax on all of the capital stock, or on the authorized capital stock, the interstate commerce of a corporation is necessarily taxed. In the present case the burden is even more evident. Interstate business is treated as "business transacted in Illinois" and is expressly included in de-

termining the part of the capital represented by business and property in Illinois. The tax is expressly imposed on stock represented by interstate commerce.

This Court has expressly held in two recent cases that interstate commerce cannot be burdened even if the burden is slight and unimportant and has definitely disapproved the language in earlier cases to the contrary.

In *Alpha Portland Cement Co.* v. *Massachusetts,* 268 U. S. 203, at 218, this Court held:

> "It must now be regarded as settled that a state may not burden interstate commerce under the guise of regulating or taxing intrastate business. * * * The amount demanded is unimportant when there is no legitimate basis for the tax. So far as the language of *Baltic Mining Co.* v. *Massachusetts,* 231 U. S. 68, 87, tends to support a different view, it conflicts with conclusions reached in later opinions and is now definitely disapproved."

In the case of *Cudahy Packing Company* v. *Hinkle,* 49 Sup. Ct. 204, the Court quoted the above language from the *Alpha Portland Cement case* and said:

> "*Baltic Mining Co.* v. *Massachusetts,* had sometimes been regarded as lending support to the theory that a tax which really burdens interstate commerce and reaches property beyond the state may be sustained if relatively small. This view did not harmonize with the principles approved by *Looney* v. *Crane Co.,* and was expressly disapproved by *Alpha Portland Cement Co.* v. *Massachusetts.*"

Not only the case of *Baltic Mining Co.* v. *Mass.,* 231 U. S. 68, but any other case, insofar as it tends to support a different view, must likewise be definitely disapproved.

This Court in the *Airway case* held that the interstate business of a foreign corporation must not be burdened, even though all of the property of the foreign corporation is located within the taxing state, and all goods are shipped from that state.

These decisions of this Court, and not the *Hump Hairpin case,* are decisive of the present case. The *Hump Hairpin case,* insofar as it is in conflict with these later decisions, must have been disapproved by this Court.

IV.

The decision of Hump Hairpin Mfg. Company v. Emmerson is not applicable to the present case. The interstate commerce of petitioner was the largest element entering into the computation of the tax, and the assessment is not incidental, remote or unimportant so far as interstate commerce is concerned.

In the *Hump Hairpin case* the interstate business amounted to $235,000, the business done with residents of the state amounted to $25,000, and the property of the corporation, all of which was in Illinois, amounted to $5,540,000. This Court pointed out that the interstate commerce was only one of three factors and "if the fee or privilege tax were computed at the statutory rate on the whole of the interstate business, it would be trifling in amount, but if computed on the property admitted to have been in use in the state, it would be but slightly less than the amount collected."

In the present case the amount of the property of petitioner in Illinois is $6,894,903.27, and the amount of interstate business transacted by it is $9,751,042.78. The intrastate business of petitioner was only $1,919,882.73. The total business of petitioner was $11,670,925.51.

The secretary of state, in determining the proportion of petitioner's capital stock represented by business and property in Illinois, used the following formula:

$$\frac{6{,}894{,}903 \text{ (Ill. prop.)} + 11{,}670{,}925.51}{6{,}924{,}804.92 \text{ (All prop.)} + 11{,}670{,}925.51} = .998$$

and taxed petitioner on 99.8 per cent of its issued capital stock.

If the secretary of state had not included interstate business, the following formula would have been used:

$$\frac{6,894,903.00 + 1,919,882.73}{6,924,804.92 + 11,670,925.51} = .522$$

Petitioner should have been taxed on 52.2 per cent of its capital stock.

Petitioner was taxed on 47.6 per cent of its stock which was attributable to interstate commerce. This additional tax amounted to $1,328.81. This additional tax was over forty-five per cent of the tax actually paid, and almost ninety per cent of what the tax should have been.

Such a burden is not incidental or remote. The interstate business of petitioner was the largest element entering into the computation of the tax, and the tax was almost doubled by its inclusion.

In the *Hump Hairpin case* this Court said at page 293:

> "If the Secretary of State or the Court, in computing the tax, erroneously treated as intrastate that which was really interstate business, such error would be reason in a proper case for correcting the computation."

Yet, in the present case, the Supreme Court of Illinois has failed to correct the computation where the tax is practically doubled by the inclusion of interstate commerce. The State Supreme Court has held that such interstate business was "business transacted in Illinois."

Section 105 of the General Corporation Act of Illinois as now construed by the Supreme Court of Illinois, requires a foreign corporation to pay a license fee for the privilege of doing business in Illinois directly computed on the interstate business of the corporation.

The State Supreme Court no longer shows a "candid purpose to differentiate state from interstate business and to use only the former in determining the amount of the dis-

puted tax." This Court's holding that a computation including interstate commerce should be corrected has been ignored, and the decision of this Court has been relied upon as authorizing the imposition of a burden on interstate commerce.

The decision of the Supreme Court of Illinois holding Section 105 of the General Corporation Act of Illinois valid, imposes a direct and substantial burden on the interstate commerce engaged in by your petitioner in violation of Article I, Section 8, Clause 3, of the Constitution of the United States. It is respectfully submitted that a writ of certiorari should be granted and this Court should review the decision of the Supreme Court of Illinois.

Respectfully submitted,

COLIN C. H. FYFFE,
Counsel for Petitioner.

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FEB 17

CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1929.

NO. 375

WESTERN CARTRIDGE COMPANY, a Corporation,
Petitioner,

vs.

LOUIS L. EMMERSON, Secretary of State of the State of Illinois,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF OF PETITIONER.

COLIN C. H. FYFFE,
COUNSEL FOR PETITIONER.

HAMMOND & LOOMIS CO., LAW PRINTERS, CHICAGO

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vs.

LOUIS L. EMMERSON, Secretary of State of the State of Illinois,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF OF PETITIONER.

STATEMENT OF THE CASE.

MAY IT PLEASE THE COURT:

This case comes to this Court by Certiorari to review a decree of the Supreme Court of Illinois. An order directing that the Writ of Certiorari issue was entered by this Court on October 21, 1929. The decision of the Supreme Court of Illinois is reported in Volume 335 of the Illinois Reports, page 150.

The grounds, on which the jurisdiction of this Court is invoked, are set forth in the petition for the Writ of Cer-

tiorari. Petitioner contends that the license fee or franchise tax imposed on it, as a foreign corporation for the privilege of doing business in Illinois, burdens its interstate commerce, because interstate business was regarded as "business transacted in Illinois" in determining the proportion of its issued capital stock represented by business transacted and property located in Illinois.

The petitioner is a corporation organized under the laws of Delaware and authorized to do business in Illinois, with capital stock of the par value of $5,701,800.00 issued and outstanding. It filed its Bill of Complaint in the Circuit Court of Sangamon County to enjoin Louis L. Emmerson, then Secretary of State of Illinois, from paying over to the State Treasurer of Illinois, the amount which he had collected from the petitioner as its annual license fee or franchise tax for the year beginning July 1, 1927. (Rec. 1.)

This license fee or franchise tax was assessed and collected under Section 105 of the General Corporation Act of Illinois of 1919, as amended, for the privilege of doing business in Illinois, and was in addition to other taxes and not in lieu thereof. This section provided:

> "Section 105. Each corporation for profit, including railroads, except insurance companies, heretofore or hereafter organized under the laws of this State or admitted to do business in this State, and required by this Act to make an annual report, shall pay an annual license fee or franchise tax to the Secretary of State of five cents on each one hundred dollars of the proportion of its issued capital stock, or amount to be issued at once, represented by business transacted and property located in this State, but in no event shall the amount of such license fee or franchise tax be less than that required by this Act of corporations having no property or business in this State.
>
> In the event that the corporation has stock of no par value, its shares, for the purpose of fixing such fee, shall be taken and considered at the amount of the consideration received or to be received by such corporation for such shares."

Petitioner is engaged in the manufacture of small arms and ammunition, with its principal place of business located at East Alton, Illinois. It has two factories, one at East Alton and the other at Springfield, Illinois. (Rec. 14.) Its total property in the year 1926 was valued at $6,924,804.92 of which $6,894,903.27 was located in Illinois. (Rec. 1.)

The total business of petitioner for that year amounted to $11,670,925.51. Of this amount $1,919,882.73 was intrastate commerce. The balance of $9,751,042.78 consisted of sales of goods from Illinois to customers outside of the state. (Rec. 1.)

Petitioner filed its annual report with the Secretary of State, setting out the amount of its par value capital stock issued, the total value of all its property, the total value of all of its property in Illinois, its total business transacted everywhere in the year 1926, and its total business for that year "transacted by it at or from places of business in Illinois." In showing business "transacted at or from places of business in Illinois" petitioner separated interstate and intrastate transactions and showed $1,919,882.73 as intrastate and $9,751,042.78 as interstate. (Rec. 2.)

The Stipulation of Facts filed in the Court below shows that the business reported in the annual report as interstate business was transacted in the following manner (Rec. 14):

Customers in other states and countries than Illinois sent orders from their respective places of business to petitioner at its places of business in Illinois. These orders provided for shipment f.o.b. petitioner's factories in Illinois to the purchasers in other states or countries. In each case a written acceptance of the order was sent by petitioner from its place of business to the customer outside the state. Petitioner then delivered the goods to a carrier and entered into contracts with the carrier to deliver the goods to the purchasers outside the state. The goods were then transported across the state lines of Illinois, and delivered to the purchasers in other states and countries by the carrier.

The Secretary of State regarded and treated this business as "business transacted in Illinois," and it was included by him in determining the proportion of petitioner's capital stock represented by property located and business transacted in Illinois. The Secretary of State used the following formula in determining this proportion:

$$\frac{\text{(Illinois) (property)}\ \$6,894,903.27 \quad \text{plus}\ \$11,670,925.51\ \text{(business in Ill. (including inter-state business)})}{\text{(Total) (property)}\ \$6,924,804.92 \quad \text{plus}\ \$11,670,925.51\ \text{(Total (business}} = .998$$

and taxed petitioner on 99.8 per cent of its issued capital stock, or $5,616,060.00. The tax so assessed was $2,808.03.

If the Secretary of State had regarded petitioner's intrastate business only as the "business transacted in this State," he would have used the following formula in determining the proportion of its stock represented by property located and business transacted in Illinois:

$$\frac{\text{(Illinois) (property)}\ \$6,894,903.27 \quad \text{plus}\ \$1,919,882.73\ \text{(Intrastate (business in) (Illinois)})}{\text{(Total) (property)}\ \$6,924,804.92 \quad \text{plus}\ \$11,670,925.51\ \text{(Total (business)}} = .552$$

Petitioner would then have been taxed on 52.2 per cent of its capital stock, or $2,958,440, and the tax would have amounted to $1,479.22.

Petitioner paid the amount demanded under protest. It then filed its Bill against the Secretary of State alleging that the tax was not assessed and collected in accordance with the provisions of Section 105 of the General Corporation Act of Illinois in that interstate business was included as "business transacted in this state"; and further alleging that if Section 105 of the Corporation Act required the inclusion of interstate business as business transacted in Illinois it was unconstitutional. (Rec. 4, 5.) Petitioner further alleged that of the amount paid, $1,328.81 was solely based upon and attributable to its interstate commerce.

A temporary injunction was granted. The case was then heard on Bill, Answer and the Stipulation of Facts, heretofore referred to, as to the nature of the business transacted. On the final hearing, the Circuit Court of Sangamon County dismissed the Bill of Complaint, and the Supreme Court of Illinois affirmed the decree of the Circuit Court.

Petitioner contends that the license fee imposed by the Secretary of State upon it is a direct burden on its interstate commerce, in violation of Clause 3, Section 8 of Article I of the Constitution of the United States.

Errors assigned in the petition as reasons for allowance of writ.

The errors set forth in the petition for writ of certiorari as reasons for allowance of the writ are found on pages 4 and 5 of the petition for writ of certiorari filed in this Court. They are—

1. The inclusion of interstate business of petitioner as "business transacted in Illinois" in computing the annual license fee assessed on it as a foreign corporation for the privilege of doing business in Illinois under Section 105 of the Illinois Corporation Act imposed a direct burden on the interstate commerce of petitioner contrary to the commerce clause, Clause 3, Section 8, Art. I of the Constitution of the United States, and the Supreme Court of Illinois erred in not so holding.
2. The burden on the interstate commerce of the petitioner is substantial and direct. Its license fee was almost doubled by the inclusion of interstate commerce as "business transacted in Illinois." The Supreme Court of Illinois erred in holding that the tax was not directly imposed or computed on interstate commerce.
3. The Supreme Court of Illinois erred in holding that the decision of this Court in the case of *Hump Hairpin Mfg.*

Company v. *Emmerson*, 258 U. S. 290, was decisive of this case.

4. The decision of this Court in the case of *Hump Hairpin Company* v. *Emmerson*, is not applicable to the present case. The interstate commerce of petitioner is the largest element entering into the computation of the tax, and the assessment is not incidental, remote or unimportant so far as interstate commerce is concerned.

SUMMARY OF ARGUMENT.

I.

The decision of the Supreme Court of Illinois in the present case construes and interprets Section 105 of the Illinois General Corporation Act of 1919, as amended. By this construction, the words—"business transacted in this State"—are made to include the business described in the bill of complaint and in the stipulation of facts.

General Corporation Act of 1919, Sec. 105, as amended by Act of May 12, 1927.

Western Cartridge Co. v. *Emmerson,* 335 Ill. 150.

II.

The business so described and found by the Supreme Court of Illinois to be business transacted in Illinois under the statute, is interstate commerce.

The facts that the property is located in Illinois, that shipments originate and contracts are approved there, do not affect the interstate character of this business.

Heyman v. *Hayes,* 236 U. S. 178.

Crew Levick Co. v. *Pennsylvania,* 245 U. S. 292.

Hump Hairpin Mfg. Co. v. *Emmerson,* 258 U. S. 290.

Eureka Pipe Line Co. v. *Hallanan,* 257 U. S. 265.

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New Jersey Bell Telephone Co. v. *State Board of Taxes and Assessments* (decided Jan. 6, 1930).

Dozier v. *Alabama,* 218 U. S. 124.

III.

The license fee or franchise tax imposed under the method adopted by the Secretary of State of Illinois, and sustained by the Supreme Court of Illinois, upon the stock of the petitioner represented by the business of the petitioner described in the stipulation of facts, is a burden upon interstate commerce, in violation of the Commerce Clause of the Constitution of the United States.

The inclusion of interstate business as "business transacted in Illinois, causes the portion of petitioner's issued capital stock representing its interstate business to be taxed. This tax accomplishes the same purpose as a tax on the proceeds of interstate commerce. License taxes based on such proceeds are invalid.

Crew Levick Co. v. *Pennsylvania*, 245 U. S. 292.
Eureka Pipe Line Co. v. *Hallanan*, 257 U. S. 265.
New Jersey Bell Telephone Co. v. *State Board of Taxes and Assessments* (decided Jan. 6, 1930).

A license fee on a foreign corporation for the privilege of doing business within a state based on all of its capital stock is invalid.

Western Union Co. v. *Kansas*, 216 U. S. 1.
Pullman Co. v. *Kansas*, 216 U. S. 57.
Looney v. *Crane Co.*, 245 U. S. 178.
International Paper Co. v. *Mass.*, 246 U. S. 135.
Cudahy Packing Co. v. *Hinkle*, 278 U. S. 460.

The case of *Airway Electric Appliance Corp.* v. *Day*, 266 U. S. 71, is a direct authority for the invalidity of the license fee in this case.

IV.

The case of Hump Hairpin Mfg. Co. v. Emmerson, 258 U. S. 290 is not decisive of this case.

A. The Supreme Court of Illinois no longer shows a candid purpose to differentiate state from interstate business and tax only the former.

B. The present case was a proper case for the correction of the computation made by the Secretary of State. The Supreme Court of Illinois refused to make that correction.

C. Interstate commerce cannot be burdened by a State in which a foreign corporation has its property located and where it approves its contracts.

Airway Electric Appliance Corp. v. *Day*, 266 U. S. 71.

D. The interstate business of petitioner was the largest single element entering into the computation.

E. Interstate commerce may not be burdened even if the burden is slight.

Alpha Portland Cement Co. v. *Massachusetts*, 268 U. S. 203.

Cudahy Packing Company v. *Hinkle*, 278 U. S. 460.

F. The cases cited in the *Hump Hairpin case* are not applicable to the facts in the present case.

ARGUMENT.

I.

The decision of the Supreme Court of Illinois in the present case construes and interprets Section 105 of the Illinois General Corporation Act of 1919 as amended. By this construction, the words: "business transacted in this State" are made to include the business described in the bill of complaint and in the stipulation of facts.

Section 105 of the General Corporation Act of Illinois provides that corporations, both foreign and domestic, shall pay an annual license fee or franchise tax on the proportion of their issued capital stock "represented by business transacted and property located in this State" (Rec. 2). The Secretary of State found that all of petitioner's business was transacted in Illinois. The Supreme Court of Illinois sustained this position.

The Agreed Statement of Facts showed that $9,751,042.78 of petitioner's business consisted of sales of goods to customers outside the State of Illinois; the shipments being made from Illinois to customers outside the State, pursuant to orders sent by these customers to petitioner in Illinois and accepted by it. The shipments in every case were across the State lines of Illinois (Rec. 14). The business so transacted was reported separate from its intrastate business by petitioner in its annual report to the Secretary of State (Rec. 2).

The Supreme Court of Illinois stated in the last paragraph of its opinion the essential facts of the business covered by the stipulation of facts and by its own decision, as follows:

> "Appellant's factories and offices were located, its manufacturing operations were conducted, orders for its

goods were accepted and shipments of its products originated in this State exclusively. Assuming that the business done by appellant with residents of States other than Illinois was inter-state business, yet the license fee or franchise tax was not directly imposed or computed upon the proceeds of interstate commerce. By the provisions of Section 105 of the general Corporation act other factors necessarily enter into the calculation. All of appellant's business was transacted in this State, and it was properly included in the process of determining the proportion of its issued capital stock, represented by business transacted and property located in Illinois, upon which the franchise tax might be computed. Such a tax does not constitute a direct or substantial burden upon interstate commerce."

The Supreme Court of Illinois in this paragraph was engaged in describing the character of the business covered by the stipulation of facts. The matter before the Court was an interpretation of Section 105. The question was whether the business described came within the phrase used in the statute "business transacted in this state." It was a direct construction of that phrase. The Supreme Court of Illinois in so construing the phrase made it cover business not only of an intrastate character, but also the only business before it, which was the business described in the agreed statement of facts. It was, therefore, a direct construction that that class of business was within the scope of the phrase used in the statute. The petitioner contended that the business was interstate business and therefore could not properly fall within the purview of the phrase used in the statute. The Supreme Court of Illinois held that this very business so described did fall within the purview of the statute even though it was interstate commerce, and that in consequence it was liable to the payment of the tax imposed, and represented by its proportion of the total capital stock of the corporation.

II.

The business so described and found by the Supreme Court of Illinois to be business transacted in Illinois under the statute, is interstate commerce.

As a general definition, we may take the following from *Addyston Pipe & Steel Company* v. *United States*, 175 U. S. 211 at page 241:

> "As has frequently been said, interstate commerce consists of intercourse and traffic between the citizens or inhabitants of different states, and includes not only the transportation of persons and property, and the navigation of public waters for that purpose, but also the purchase, sale and exchange of commodities."

The business transacted by the petitioner in this case consisted of shipments of goods from Illinois to purchasers in other states pursuant to orders received by the petitioner for such goods from the purchasers. In every case the shipment went across state lines. Such transactions are interstate commerce.

Heyman v. *Hayes*, 236 U. S. 178.
Crew Levick Co. v. *Pennsylvania*, 245 U. S. 292.
Hump Hairpin Mfg. Company v. *Emmerson*, 258 U. S. 290.
Eureka Pipe Line Co. v. *Hallanan*, 257 U. S. 265.
Airway Electric Appliance Corp. v. *Day*, 266 U. S. 71.
New Jersey Bell Telephone Co. v. *State Board of Taxes and Assessments*, decided by the Supreme Court of the United States January 6, 1930.

The Supreme Court of Illinois in its opinion admitted that this business was interstate commerce. The Court, however, seemed to be influenced by the facts that the factories and offices of petitioner were located in Illinois, that its manu-

facturing operations were conducted there, and that orders were accepted and shipments originated there.

These facts do not give any right to the State of Illinois to burden petitioner's interstate business. In the cases of *Airway Electric Appliance Corp.* v. *Day*, 266 U. S. 71, and *New Jersey Bell Telephone Co.* v. *State Board of Taxes and Assessments*, decided January 6, 1930, all of the property was located within the state levying the license fee, and the statutes were held invalid because of the burden on interstate commerce.

Likewise, the State in which the shipments or other interstate business originate cannot impose a burden on it.

Crew Levick Co. v. *Pennsylvania*, 245 U. S. 292.
Eureka Pipe Line Co. v. *Hallanan*, 257 U. S. 265.
Airway Electric Appliance Corp. v. *Day*, 266 U. S. 71.

The question what is interstate commerce does not depend on the place where the contract is made or where title passes.

Dozier v. *Alabama*, 218 U. S. 124.

None of these circumstances relied upon by the Supreme Court of Illinois affects or changes the interstate character of petitioner's business.

III.

The license fee or franchise tax imposed under the method adopted by the Secretary of State of Illinois, and sustained by the Supreme Court of Illinois, upon the stock of the petitioner represented by the business of the petitioner described in the stipulation of facts in this case, is a burden upon interstate commerce, in violation of the Commerce Clause of the Constitution of the United States.

The license fee or franchise tax paid by petitioner was a direct burden on its interstate commerce. Almost one-half of the tax was paid on stock directly representing interstate commerce. The amount of the tax was almost doubled by the inclusion of interstate business as business transacted in Illinois.

The par value of the total issued capital stock is $5,701,800 (Rec. 1). The Secretary of State assessed the petitioner on $5,616,060 of its stock as the proportion of its total issued capital stock represented by property located and business transacted in Illinois. The amount of the tax so assessed was $2,808.03. The Secretary of State, in determining this proportion, used the following formula:

$$\frac{\text{(Illinois property)} + \text{(business in Ill. (including inter-state business)})}{\text{(Total property)} + \text{(Total business)}} = .998$$

$$\frac{\$6{,}894{,}903.27 + \$11{,}670{,}925.51}{\$6{,}924{,}804.92 + \$11{,}670{,}925.51} = .998$$

By the use of this formula, the Secretary of State found that 99.8 per cent of petitioner's capital stock was represented by property located and business transacted in Illinois, and taxed it on that proportion of its stock.

If the Secretary of State, in determining the proportion of the capital stock of petitioner represented by business transacted and property located in Illinois, had not included the interstate business described in the stipulation as business

transacted in Illinois, the following formula would have been used:

$$\frac{\text{(Illinois property) } \$6{,}894{,}903.27}{\text{(Total property) } \$6{,}924{,}804.92} \text{ plus } \frac{\text{(Intrastate business (in Illinois)) } \$1{,}919{,}882.73}{\text{(Total business) } \$11{,}670{,}925.51} = .552$$

If the interstate business had not been included as business transacted in Illinois, petitioner would have been taxed on 52.2 per cent of its capital stock. 52.2 per cent of the issued capital stock of petitioner amounts to $2,958,440.

The difference between $5,616,060 and $2,958,440—or $2,657,620—is the part of the capital stock directly represented by interstate business included by the Secretary of State as business transacted in Illinois in determining the proportion of its business transacted and property located in Illinois.

The tax on this sum of $2,657,620, being the part of the capital stock representing interstate commerce, amounted to $1,328.81. This part of the total license fee or franchise tax paid by the petitioner was paid by it on that part of its stock which was represented by interstate business. It was directly computed on the stock so represented, and was almost one-half of the total tax paid.

Under the construction of Section 105 of the General Corporation Act of Illinois, adopted by the Supreme Court of Illinois, whereby interstate business from places of business in Illinois is held to be business transacted in Illinois, the proportion of the capital stock representing this interstate business is directly taxed.

The amount of the tax which is attributable to such interstate commerce will vary with the amount of interstate business transacted by the corporation. As the interstate business of the foreign corporation increases or decreases, the proportion of the total tax which is directly

attributable to that interstate commerce will increase or decrease.

The proportion of the tax which interstate commerce must bear under the construction placed on the statute by the Supreme Court of Illinois varies with the amount of the interstate business. The tax accomplishes the same purpose as a direct tax on the proceeds of interstate commerce. License taxes based on such proceeds have been held invalid by this Court in many cases.

Crew Levick Co. v. *Pennsylvania*, 245 U. S. 292.
Eureka Pipe Line Co. v. *Hallanan*, 257 U. S. 265.
New Jersey Telephone Co. v. *State Board of Taxes and Assessments*, decided Jan. 6, 1930.

In the case last cited, this Court held that a statute of the State of New Jersey, imposing a franchise tax on the appellant on such proportion of its gross receipts as the length of its lines or mains in the streets bears to the length of its whole lines or mains, was a direct tax on the gross receipts derived from interstate commerce and to that extent at least, was void. This Court said:

> "This tax cannot be sustained if it is not upon the property but is in fact a tax upon appellant's gross receipts from interstate and foreign commerce or a license fee to be computed thereon."

The tax in the present case is a license fee and is computed directly on stock representing interstate commerce.

As this Court said in *Crew Levick* v. *Pennsylvania*, 245 U. S. 292, the portion of the tax "which is measured by receipts from foreign commerce necessarily varies in proportion to the volume of that commerce, and hence is a direct burden upon it." So, adapting slightly this language, we may say, with entire truth, of the effect of the construction placed by the Supreme Court of Illinois upon the statutory provision, that the portion of tax "which is measured by the stock rep-

resenting foreign commerce necessarily varies in proportion to the volume of that commerce, and hence is a direct burden upon it."

The license fee or franchise tax in the present case was imposed on petitioner, a foreign corporation, for the privilege of doing business in Illinois. A State cannot require a foreign corporation to submit to a tax on its interstate business as a condition to the right to do a local business within the State.

In the case of *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1, this Court held that a statute of the State of Kansas imposing a license fee upon a foreign corporation based on the total capital stock of the corporation was invalid for the reason that it burdened the interstate commerce of the corporation.

This case has been followed by this Court in a long line of cases involving similar statutes.

Pullman Co. v. *Kansas*, 216 U. S. 57.

Looney v. *Crane Company*, 245 U. S. 178.

International Paper Company v. *Massachusetts*, 246 U. S. 135.

Airway Electric Appliance Corp. v. *Day*, 266 U. S. 71.

Cudahy Packing Co. v. *Hinkle*, 278 U. S. 460.

In the case of *International Paper Co.* v. *Mass.* (*supra*), this Court outlined the following principles laid down in the cases of *Western Union Co.* v. *Kansas, supra; Pullman Co.* v. *Kansas, supra, and Looney* v. *Crane Co., supra.*

The Court said:

"1. The power of a State to regulate the transaction of a local business within its borders by a foreign corporation,—meaning a corporation of a sister State,—is not unrestricted or absolute, but must be exerted in subordination to the limitations which the Constitution places on state action.

2. Under the commerce clause exclusive power to regulate interstate commerce rests in Congress, and a state statute which either directly or by its necessary operation burdens such commerce is invalid, regardless of the purpose with which it was enacted.

3. Consistently with the due process clause, a State cannot tax property belonging to a foreign corporation and neither located nor used within the confines of the State.

4. That a foreign corporation is partly, or even chiefly, engaged in interstate commerce does not prevent a State in which it has property and is doing a local business from taxing that property and imposing a license fee or excise in respect of that business, but the State cannot require the corporation as a condition of the right to do a local business therein to submit to a tax on its interstate business or on its property outside the State.

5. A license fee or excise of a given per cent. of the entire authorized capital of a foreign corporation doing both a local and interstate business in several States, although declared by the State imposing it to be merely a charge for the privilege of conducting a local business therein, is essentially and for every practical purpose a tax on the entire business of the corporation, including that which is interstate, and on its entire property, including that in other States; and this because the capital stock of the corporation represents all its business of every class and all its property wherever located.

6. When tested, as it must be, by its substance—its essential and practical operation—rather than its form or local characterization, such a license fee or excise is unconstitutional and void as illegally burdening interstate commerce and also as wanting in due process because laying a tax on property beyond the jurisdiction of the State."

In the case of *Airway Electric Appliance Co.* v. *Day, supra,* this Court held that a license fee based on the proportion of the authorized stock of a foreign corporation represented by business and property in the State of Ohio was invalid, because it directly burdened interstate commerce.

This Court said:

> "As some of the outstanding shares are represented by plaintiff's interstate business, the application of the rate to all the shares, or to a number greater than the total outstanding, necessarily amounts to a tax and direct burden upon all the property and business, including the interstate commerce of the plaintiff."

These decisions are expressly applicable to the present case. A tax on the total capital stock of a foreign corporation engaged in interstate commerce burdens that interstate commerce because "the capital stock of the corporation represents all its business of every class and all its property wherever located." *International Paper Co.* v. *Massachusetts*, 246 U. S. 135 at 142.

The tax in the present case is invalid because the proportion of the stock on which it is based is determined by including interstate business as business transacted in Illinois.

In the present case almost one-half of the stock represents the interstate commerce of petitioner. In the cases above cited, interstate commerce is burdened because stock which represents it is necessarily included in the tax. In the present case it is burdened because the proportion of the stock representing it, is expressly included by the construction of the State Supreme Court, as part of the stock taxed.

In the cases cited, the amount of the burden is not definitely shown because the proportion of the stock representing its interstate business is not known. In the present case the amount of the burden is clearly ascertainable.

From the formulas heretofore set out in this brief (pages 14 and 15), we can determine the exact proportion of petitioner's stock represented by interstate business, by property outside the State, and by property and intrastate business in Illinois. The Secretary of State taxed petitioner on 99.8% of its total issued stock. The .2% not taxed represented

property outside Illinois. If interstate commerce had been excluded, petitioner would have been taxed on 52.2% of its stock.

.2% of petitioner's stock represented its property outside Illinois, 52.2% represented its property in Illinois and its intrastate business, 47.6% represented its interstate business.

The placing of the tax on 99.8% of petitioner's stock, representing its property in Illinois and all its intrastate and interstate business, and excluding only the part of its stock representing property outside the State, imposes the same burden on petitioner as that held invalid in the cases above cited.

IV.

The case of Hump Hairpin Mfg. Company v. Emmerson is not decisive of this case.

The Supreme Court of Illinois based its decision on the case of *Hump Hairpin Mfg. Company* v. *Emmerson,* 258 U. S. 290, and stated that it was decisive of this case.

The *Hump Hairpin* case is not decisive of the present case. The decision of this Court in that case is not applicable to the situation of the petitioner.

(A) In that case this Court said:

> "The statute and the state Supreme Court both show a candid purpose to differentiate state from interstate business and to use only the former in determining the amount of the disputed tax * * *" (p. 293).
>
> "Clearly, the statute is not a disguised attempt to tax interstate commerce. On the contrary, its purpose plainly is to differentiate state from interstate business and to impose the tax only on the former." (P. 295.)

The Supreme Court of Illinois no longer shows a "candid purpose to differentiate state from interstate commerce and to use only the former in determining the amount of the disputed tax." It held that the business transacted by pe-

titioner was business transacted in Illinois, and said in the present case (Rec. 28):

> "Assuming that the business done by appellant, with residents of States other than Illinois, was interstate business, yet the license fee or franchise tax was not directly imposed or computed upon the proceeds of interstate commerce."

This shows a candid purpose, not to differentiate state from interstate business, but to treat them in the same manner and to impose the tax on both.

(B) In the *Hump Hairpin* case this Court said (p. 293):

> "If the Secretary of State or the Court, in computing the tax erroneously treated as intrastate that which was really interstate business, such error would be reason in a proper case for correcting the computation, but would not justify declaring the act unconstituional."

The present case is such a proper case. In its Annual Report to the Secretary of State, petitioner separated its interstate and intrastate business transacted from places of business in Illinois (Rec. 2). In its Bill for Injunction, it alleged that the tax was erroneously computed, and asked that the Secretary of State be enjoined from paying over the amount of the tax which was based on its interstate business (Rec. 6).

The Supreme Court of Illinois refused to correct the computation. This Court's holding that a computation including interstate commerce should be corrected, has been ignored, and the decision of this Court has been relied upon as authorizing the imposition of a burden on interstate commerce.

We respectfuly urge that under the decision of this Court in the *Hump Hairpin* case the computation by the Secretary of State in the present case should have been corrected by the Supreme Court of Illinois. In that computation interstate business was treated as intrastate by the Secretary of

State. If the statute required the computation to be made in that way (and the Supreme Court of Illinois held that it did) it is unconstitutional, as it imposes a burden on the interstate commerce of foreign corporations.

If this Court feels that the present case only involves the correction of the computation, we ask that this Court make that correction. This case is in this Court on a Writ of Certiorari. The tax imposed, irrespective of the question of the constitutionality of the statute, is repugnant to the Commerce Clause of the Constitution of the United States so far as it burdens petitioner's interstate business.

(C) This Court, in the *Hump Hairpin* case, stated that the facts that all of the Company's property was located in Illinois, that all its manufacturing operations were conducted there, and that the contracts must be approved at Chicago, "reduced the interstate element of its business to its lowest terms."

In the later case of *Airway Electric Appliance Corp.* v. *Day*, 266 U. S. 71, this Court held that the interstate business of the corporation, which was transacted in the same manner as the interstate business of petitioner in this case, was burdened by a license fee imposed under an Ohio statute on the proportion of its authorized stock represented by business and property in Ohio. All of the Airway Company's property was located in Ohio. It manufactured its product there and sold it within the State of Ohio and in interstate commerce. The District Court of the Southern District of Ohio, Eastern Division, had held (3 Fed. 2nd 369) that the interstate business of the Company, amounting to 72% of its total business, should not be included as business transacted in Ohio. That Court said:

> "The annual tax assessed against a foreign corporation is, it is true, for the privilege of exercising its franchises in the State; but, the interstate business being a factor in measuring the amount, if the tax be excessive on account of such factor, the net result is the substantial and genuine fettering of such business."

This Court held that the imposing of a license fee on authorized instead of issued capital stock imposed a burden on the interstate business of the corporation. The Court said:

> "As some of the outstanding shares are represented by plaintiff's interstate business, the application of the rate to all the shares, or to a number greater than the total outstanding, necessarily amounts to a tax and direct burden upon all the property and business including the interstate commerce of the plaintiff."

The "interstate element" in the business of the Airway Company was the same as that of petitioner. The interstate business which was taxed and burdened in that case was of the same kind as petitioner's interstate business.

(D) In the *Hump Hairpin* case, this Court said that the interstate business of the corporation was only one of three factors used in determining the amount of stock subject to the tax, and said—"if the fee or privilege tax were computed at the statutory rate on the whole of the interstate business, it would be trifling in amount; but if computed on the property admitted to have been in use in the State, it would be but slightly less than the amount collected."

In the present case the amount of the property in Illinois is $6,894,903.27. The amount of the intrastate business is $1,919,882.72. The interstate business amounts to $9,751,042.78.

The interstate business of petitioner was the largest single element entering into the computation. 47.6% of petitioner's stock was represented by this business. The additional tax amounted to $1,328.81, which was over forty-five per cent of the tax actually paid, and almost ninety per cent of what the tax should have been. This was due solely to the inclusion of the stock representing the interstate business of the petitioner. The burden on the interstate business was not incidental and remote.

(E) In the *Hump Hairpin* case, this Court said—(page 296):

> "At most the assessment, so far as interstate commerce is concerned, is incidental, remote and unimportant, and it is therefore constitutional."

This Court has expressly held in two recent cases that interstate commerce may not be burdened even if the burden is slight, and has definitely disapproved the language in earlier cases to the contrary.

In *Alpha Portland Cement Co.* v. *Massachusetts*, 268 U. S. 203, at 218, this Court held:

> "It must now be regarded as settled that a state may not burden interstate commerce * * * under the guise of regulating or taxing intrastate business. * * * The amount demanded is unimportant when there is no legitimate basis for the tax. So far as the language of *Baltic Mining Co.* v. *Massachusetts*, 231 U. S. 68, 87, tends to support a different view, it conflicts with conclusions reached in later opinions and is now definitely disapproved."

In the case of *Cudahy Packing Company* v. *Hinkle*, 278 U. S. 460, the Court quoted the above language from the *Alpha Portland Cement* case and said:

> "*Baltic Mining Co.* v. *Massachusetts*, had sometimes been regarded as lending support to the theory that a tax which really burdens interstate commerce and reaches property beyond the state may be sustained if relatively small. This view did not harmonize with the principles approved by *Looney* v. *Crane Co.*, and was expressly disapproved by *Alpha Portland Cement Co.* v. *Massachusetts*."

Not only the case of *Baltic Mining Co.* v. *Mass.* 231 U. S. 68, but any other case, insofar as it tends to support a different view, must likewise be definitely disapproved.

(F) The cases cited by this Court in the *Hump Hairpin* case (page 294) as sustaining state excise taxes incidentally and remotely affecting interstate commerce, have no bearing on the present case.

The taxes under consideration in *Maine* v. *Grand Trunk Ry. Co.*, 142 U. S. 217; *Wisconsin & Michigan Ry. Co.* v. *Powers*, 191 U. S. 379; and *United States Express Co.* v. *Minnesota*, 223 U. S. 335, were taxes based on gross receipts. In a long line of cases this Court has limited such taxes to cases where the tax in dispute was a property tax; was the only tax levied; and was in lieu of all other taxes.

In the case of *Galveston Ry. Co.* v. *Texas*, 210 U. S. 217, at page 226, this Court explained the *Grand Trunk Ry. Co.* case and said that the tax scheme there involved might "fairly be called a commutation tax."

When an effort was made to employ gross earnings as a basis of taxation in addition to other property taxes, the tax was held invalid. *Meyer* v. *Wells Fargo & Co.*, 223 U. S. 298.

The cases of *U. S. Glue Company* v. *Oak Creek*, 247 U. S. 321, and *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. 113, involved state taxes on net income partly derived from interstate business. In the *United States Glue Company* case this Court said:

> "The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental."

In the *Underwood Typewriter* case this Court also pointed out that the payment of the tax was not made a condition of the right to carry on business, but its enforcement was left to the ordinary means of collecting taxes.

In the present case the tax is not a property tax. *People* v. *Emmerson*, 305 Ill. 348. It is a license fee or franchise tax for the privilege of doing business in Illinois and is in addition to all other taxes. Payment of the tax is a condition of continuing to do business within the State. The gross

receipts from interstate business, and not net income, are employed in determining the proportion of the stock on which the tax is based.

The distinction between license fees computed on the gross receipts from interstate commerce and property taxes, is clearly stated by this Court in the recent case of *New Jersey Bell Telephone Co.* v. *State Board of Taxes and Assessments*, decided Jan. 6, 1930, (*supra* p. 16). This Court there said:

> "This tax cannot be sustained if it is not upon the property but is in fact a tax upon appellant's gross receipts from interstate and foreign commerce, or a license fee to be computed thereon. * * *
>
> We think it very plain that the exaction is not a tax on property nor in substitution for, or in lieu of, a property tax. Within the rule heretofore applied in this Court, the exaction is a direct tax on gross receipts derived from appellant's interstate commerce and, as to that part at least, is void." (Citing cases including *U. S. Glue Co.* v. *Oak Creek*, 247 U. S. 321; *United States Express Co.* v. *Minnesota*, 223 U. S. 335; and *Crew Levick Co.* v. *Pennsylvania*, 245 U. S. 292.)

In the present case over eighty-three per cent of petitioner's business was interstate business. Forty-five per cent of the tax was imposed on stock admittedly representing that business.

The long line of decisions of this Court, holding that a state cannot require a foreign corporation to submit to a tax on its interstate business as a condition to the right to do a local business within the state, are decisive of this case.

We submit that the license fee or franchise tax imposed on petitioner constitutes a direct and substantial burden on interstate commerce, and we ask that the judgment of the Supreme Court of Illinois, holding the license fee or franchise tax valid, be reversed.

Respectfully submitted,

COLIN C. H. FYFFE,
Counsel for Petitioner.

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CHARLES ELMORE CR
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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1929.

NO. 375

WESTERN CARTRIDGE COMPANY, a Corporation,
Petitioner,

vs.

LOUIS L. EMMERSON, Secretary of State of the State of Illinois,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

REPLY BRIEF OF PETITIONER.

COLIN C. H. FYFFE,
COUNSEL FOR PETITIONER.

HAWKINS & LOOMIS CO., LAW PRINTERS, CHICAGO

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MAY IT PLEASE THE COURT:

The argument on behalf of the respondent in this case is divided into four headings. These will be found, however, to rest upon precisely the same support. It will be found that this support is taken entirely, with possibly some developments, from passages in the decision of this Court in the case of *Hump Hairpin Mfg. Co.* v. *Emmerson*, 258 U. S. 290.

In directing the attack of the petitioner corporation against the position assumed by the respondent, it will be seen that we are, at the same time, disagreeing with the expressions

and also with the conclusion based on those expressions in the *Hump-Hairpin case* upon which reliance is put by counsel for respondent. This seems inevitable. If so, counsel for petitioner begs the indulgence of the Court in pointing out wherein the suggestions in the *Hump-Hairpin case*, which are seized upon by the respondent, are at variance with later cases decided by the Court. These later cases follow cases which had been decided by this Court before the decision in the *Hump-Hairpin* case and go back so far as to include the case of *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1, and cases decided even before that outstanding case. This will necessarily be brought before this Court in the present argument.

It is necessary now to point out to the Court what the precise position is which has been taken by the respondent. Before stating that position, it may be well once more to refer to the statute in interpretation of which the litigation arises. This is Section 105 of the General Corporation Law of Illinois. The section is given in full on page 2 of petitioner's original brief. That part, which is under consideration here, is the requirement that every corporation, including foreign corporations, admitted to do business in Illinois—

> "Shall pay an annual license fee or franchise tax to the Secretary of State of five cents on each $100 of the proportion of its issued capital stock, or amount to be issued at once, represented by business transacted and property located in this State."

The question is whether the reported amount of business transacted by the corporation, petitioner, which consists of transactions in interstate commerce, is properly taxable as represented by its proportion of the stock of the Company.

The position of the respondent, Secretary of State of Illinois, is that the stock so representing interstate commerce must be considered along with the so-called factors, which

are contended to be factors, going to make up the whole interstate transaction.

It is claimed that these transactions which have been accurately described in the Stipulation of Facts, which forms part of the record in this case, are of necessity based upon—*first:* the manufacturing business out of which, performed in Illinois, the articles used in this interstate commerce came into being. *Second:* that contracts for sale to persons and corporations in other states and foreign countries of these articles were made in Illinois by the acceptance in Illinois of offers to purchase the goods, the offers coming to the offices of the petitioner from such other states or foreign countries; that in connection with such offers to purchase, or orders, the petitioner sent written acceptance from its places of business in Illinois to the purchasers' places of business in such other state or foreign country. The petitioner also delivered the goods packed and marked with the purchaser's address to a common carrier, at one or the other of the petitioner's places of business in Illinois, and a contract was thereupon made with the carrier evidenced by bills of lading by which the carrier agreed to deliver the goods at the address of the purchaser in such other state or country. In pursuance of this agreement between the petitioner and the carrier, the goods were then transported across the state lines of the State of Illinois and into another or other state or country, and delivered by the carrier to the purchaser in such states and countries other than Illinois.

The only question in this case is whether the stock representing such transactions may be subjected to the tax under Section 105 of the Act.

It is contended in answer that it would be impossible to find a clearer definition or description of a transaction which should be held to be a transaction in interstate commerce and protected *in toto* under the Commerce Clause of the Constitution under the decisions of this Court; which, with the single

exception of the *Hump-Hairpin* case have sustained such transactions as being so protected.

However, the following excerpts from the brief of counsel for respondent show that this is precisely his position.

(Page 4):

"Since all of the manufacturing business of the petitioner was carried on at its factories in Illinois and its products were shipped from such factories upon orders received and accepted at its offices in that State, the respondent considered all such sales as a part or measure of the business transacted in Illinois."

(Page 5):

"The position of the respondent here is that all of the business of the petitioner was in fact carried on at its factories and offices in the State of Illinois, and that the amount of sales made was merely taken as a measure or index of the amount of business transacted in that State; that such business, together with the amount of property in Illinois, represented the proportion of capital stock used in that State, upon which the annual franchise tax of petitioner was computed; that a tax assessed in that manner is not a direct tax upon interstate commerce, and did not constitute an illegal burden on any such business of the petitioner, under the prior decisions of this Court."

(Page 7):

"The manufacturing operations of the petitioner at its factories in Illinois, the receipt and acceptance of offers or orders for its product at its offices in that State and the shipment of such products from said factories constituted the transaction of business in that State, and the amount of the sales of such products was properly taken as the measure of the amount of such business for the purpose of computing its franchise tax, even though part of such sales were made to residents of other states."

(Page 10):

"The business of the petitioner did not consist merely in the final disposition of its products, but included its

manufacturing operations in Illinois to produce such goods, the receipt and acceptance of orders or offers for same at its offices in that State, and the shipment of such goods from its factories to purchasers in that and other states."

(Page 10):

"Such business was, therefore, transacted entirely in Illinois and only the shipment and final delivery of part of the goods to purchasers outside of the state had any element of interstate commerce."

(Page 11):

"The Court (Supreme Court of Illinois in present case) there pointed out that the petitioner's factories and offices were located, its manufacturing operations were conducted, orders for its goods were accepted and shipments of its products originated in that State exclusively."

Referring to and quoting from the decision of this Court in the *Hump-Hairpin case*, it was further stated in the brief:

(Page 12):

"The Court said that the fact that all of the property of the corporation was located in Illinois and all its manufacturing operations were carried on in that State, and all contracts for sales were approved at its office in that State, certainly reduced the interstate element in its business to the lowest terms."

So the argument goes on. Almost every page of the brief for respondent restates the same theory. It will be found on pages 13, 14, 21, 22, 23, 24, 25, 26, 28.

Here we have a brand-new doctrine. This doctrine has never received any consideration from this Court, unless in the *Hump-Hairpin* decision. It is impossible to say that any such doctrine has received any other support from this Court. On the contrary,—if there is any matter which has been treated with extraordinary care by this Court to ward off any assault upon the prerogatives of the Congress under

the Constitution, it is in this matter of the protection of interstate commerce from adverse legislation by State Governments.

In this case the Court has before it a genuine interstate commerce, as shown by the stipulation or agreed statement of facts which has been entered into by both parties. Nothing is clearer than that this is, we say again, genuine interstate commerce. Yet, it is, by an ingenious and thoroughly fallacious argument, so mixed up with a consideration of the preceding manufacturing activities of the corporation that it is subjected to a tax precisely as if the corporation did no interstate commerce whatever.

The distinction so well-known between the processes of manufacture on the one hand and commerce itself on the other hand, for the purpose of keeping interstate commerce away from the state control, has been wholly forgotten.

The leading case, in drawing the strict line between the business of manufacturing and the business of interstate commerce, is *United States* v. *E. C. Knight & Co.*, 156 U. S. 1. This was a bill under the Sherman Act to set aside the purchase by one of the defendants of four other sugar refineries engaged in the business of refining sugar. By the purchase of the stock of these four refineries, the American Sugar Refining Company acquired nearly complete control of the *manufacture* of refined sugar within the United States.

The bill charged that the contracts under which these purchases were made constituted combinations in restraint of trade, and that in entering into these contracts the defendants combined and conspired to restrain the trade and commerce in refined sugar among the several states and with foreign nations contrary to the Act of July 2, 1890, and asked for the cancellation of the agreements accomplishing the purchases and an injunction against the further performance of the agreements.

The Court held that the matter of the manufacture of the sugar was purely an intrastate affair and that it was in no sense to be connected with the interstate commerce which might follow from the manufacture of the refined sugar.

As to the nature of manufacturing, the Court said:

> "Although the exercise of that power may result in bringing the operation of commerce into play, it does not control it, and affects it only incidentally and indirectly. Commerce succeeds to manufacture and is not a part of it."

Again, the Court said, on page 13:

> "Contracts to buy, sell or exchange goods to be transported among the several states, the transportation and its instrumentalities, and articles bought, sold or exchanged for the purpose of such transit among the states, or put in the way of transit, may be regulated, but this is because they form part of interstate trade or commerce."

The Court is here speaking, of course, of regulation by Congress. Other statements might be quoted from this case, but it is needless to do so.

The distinction is clear. Now, we find that in the present case the respondent is seeking to find an opening for the State to derive revenue from a tax upon interstate commerce assessed by petitioner by the working of a new device.

Taking all the statements in the brief for respondent, his theory may be fairly stated thus: In spite of the words of the statute, there must be included, under the heading of business transacted in Illinois, all the interstate commerce of the corporation, for the reason that the goods used in such interstate commerce are assumed to be manufactured by petitioner in the State of Illinois at one or the other factory of the petitioner. This is bad enough as an invasion of the interstate commerce carried on by the petitioner. It is by

no means the worst feature. The petitioner also includes, as part of the business which goes to make up the interstate commerce, the making of contracts in Illinois for the sale of articles traded in by the respondent in this same interstate commerce.

Let us see what these contracts are. They are simply accepted orders for goods from purchasers in other states which the petitioner carries out by shipping the goods from one of its factories in Illinois to the places of business of the purchasers "in such other states or countries." There was also, as shown by the agreed statement of facts, contracts entered into with carriers, by which the carriers agreed to deliver the goods to the purchasers "in such other state or country than Illinois." In the case of each such offer or order, this was done pursuant to and in fulfillment of such provisions of said contract "between the petitioner and the purchaser."

In several of the statements made by the counsel for respondent, the making of these contracts is included as part of the business of the company transacted in Illinois, which to that extent reduces the quality of interstate commerce in the transaction described in the agreed statement of facts. It is true that the suggestion as to this seems to come from the case of *Hump Hairpin* v. *Emmerson*, 258 U. S. 290. In that case it is true that this Court, speaking by Mr. Justice Clark, said (page 293):

> "The facts that all of the property of the company was located in Illinois, that all of its manufacturing operations were conducted in that state, and that all contracts of sale must be approved at Chicago, where the only business office of the company was maintained, certainly reduce the interstate element in its business to the lowest terms."

With great deference counsel for the petitioner begs to say that this language, so far as the suggestion that the ap-

proval of interstate contracts of sale in Illinois gives to this interstate commerce in any way less the character of interstate commerce, is a suggestion directly at variance with the statements of this court in the case of *United States* v. *E. C. Knight Co., supra.* It is also contrary to *Dahnke-Walker Co.* v. *Bondurant,* 257 U. S. 282.

This was an action to recover damages for breach of contract. The plaintiff was a Tennessee corporation, and the defendant was a resident of Kentucky. They were parties to a contract made in Kentucky for delivery of wheat to the plaintiff. The wheat was to be paid for in Kentucky and was to be delivered on board the cars of a common carrier, and the plaintiff intended to ship it to Tennessee. The defendant refused to comply with this contract after a small initial shipment had been made. The plaintiff sued for damages.

The Court of Appeals of Kentucky reversed a judgment, which the plaintiff obtained, on the ground that it was not licensed to do business in Kentucky and could not maintain suit in that State.

This Court in discussing the decision of the Court of Appeals of Kentucky, said:

> "That court proceeded on the theory that, as the contract was made in Kentucky, related to property then in that State and was to be wholly performed therein, the transaction was strictly intrastate and not within the reach or protection of the commerce clause of the Constitution of the United States;—and this although the wheat was to be delivered on board the cars of a public carrier and the plaintiff intended to ship it to Tennessee as soon as it was so delivered."

This Court reversed the decision of the Court of Appeals of Kentucky and stated:

> "The commerce clause of the Constitution Art. I, Sec. 8, Cl. 3, expressly commits to Congress and impliedly

withholds from the several states the power to regulate commerce among the latter. Such commerce is not confined to transportation from one state to another, but comprehends all commercial intercourse between different states and all the component parts of that intercourse. Where goods in one state are transported into another for purposes of sale the commerce does not end with the transportation, but embraces as well the sale of the goods after they reach their destination and while they are in the original packages. * * * On the same principle, where goods are purchased in one state for transportation to another the commerce includes the purchase quite as much as it does the transportation. * * * This has been recognized in many decisions construing the commerce clause. Thus it was said in *Welton* v. *Missouri*, 91 U. S. 275, 280: 'Commerce is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all its forms, including the transportation, purchase, sale, and exchange of commodities.' In *Kidd* v. *Pearson*, 128 U. S. 1, 20, it was tersely said: 'Buying and selling and the transportation incidental thereto constitute commerce.' In *United States* v. *E. C. Knight Co.*, 156 U. S. 1, 13, 'contracts to buy, sell, or exchange goods to be transported among the several states' were declared 'part of interstate trade or commerce.' * * *

"The state court, stressing the fact that the contract was made in Kentucky and was to be performed there, put aside the further facts that the delivery was to be on board the cars and that the plaintiff, in continuance of its prior practice, was purchasing the grain for shipment to its mill in Tennessee. We think the facts so neglected had a material bearing and should have been considered. They showed that what otherwise seemed an intrastate transaction was a part of interstate commerce."

It seems clear then that the contracts to which reference is made in the brief for respondent, and also in the decision in the *Hump Hairpin* case by this Court, instead of tending to reduce the interstate element of the business of the petitioner to the lowest terms, is, on the contrary an essential part of the interstate features of that business.

The other element, which is introduced by the respondent so as to give the petitioner's interstate commerce more appearance of business transacted in Illinois, is, as has been shown, the use of the fact that the articles sold and transported in interstate commerce were, or may have been, manufactured in Illinois by the petitioner at one or both of its factories.

In the bringing in of this factor there is added a real element of vagueness so far as the making of any proportion of the amount of property and business located and transacted in Illinois to the total property and business of the corporation. There can be no doubt that the introduction of this outside fact as a factor in the interstate transactions of petitioner contributes a real confusion. What weight is to be given to this fact that the articles sold in interstate commerce happened to be manufactured by the petitioner at its Illinois factory? The secretary of state cuts the knot in a manner which obviates the necessity of any argument on the question, by designating all the interstate business of the petitioner as business transacted in the state. Therefore, in making out the proportion of the stock represented by this business it is all included as representing business in Illinois. No allowance of any kind is made for the more than $9,000,000 worth of interstate business as against the less than one-fifth of that amount of intrastate business. Here we have this amount of genuine interstate commerce,—admitted to be such,—to which in the proportion not the slightest recognition is given. This is a case where interstate commerce is actually taxed, and the tax justified on the sole ground that an earlier proceeding relating not to commerce, but to the manufacture of the articles of that commerce, is sought to be so interwoven with the interstate commerce as to reduce it to "the lowest terms" but leaving it still interstate commerce.

And what is this other element? Is it peculiar to the Hump Hairpin Company's case or peculiar to the present case of

the petitioner, in the transaction of their interstate business? On the contrary, these are elements which must adhere to every transaction in interstate commerce.

Is it not true that the interstate commerce carried on by the petitioner is like interstate commerce as it is done all over the country? It is not only interstate commerce, but as shown in the agreed statement of facts, it is typical interstate commerce; and yet, it is, in this case, sought to be burdened by a direct tax to which any typical interstate commerce might likewise be wrongfully subjected.

Is is not true that under the Commerce Clause of the Constitution a transaction is either one thing or the other? There are no degrees in interstate commerce.

There certainly are not two distinct kinds of interstate commerce, one of which is protected by the Commerce Clause and the other is not. The respondent says that the interstate commerce in this case is of the kind which is not to be protected by the Commerce Clause, because it partakes of the nature of business in the state. This is accomplished by showing that the articles transported in the interstate transactions were manufactured in the State of Illinois. That is the only reason which the respondent puts forward in order to save the tax.

What would be the result of the success of respondent's contention here?

If genuine interstate commerce can be burdened by a state tax by considering it as absorbed by the manufacturing processes under which the goods were made, then every protection to interstate commerce would have to be revised. In every case where goods manufactured in one state are sent across the state lines and sold in another state, such protection as they have received heretofore as being transactions in interstate commerce would have to be modified.

Counsel for respondent relies on four cases in support of this proposition. This first of these is *Hump Hairpin Mfg. Co.* v. *Emmerson,* 258 U. S. 290, which underlies his entire argument. This case has been considered in petitioner's original brief in connection with the later decisions of this Court in *Airway Electrical Appliance Corp.* v. *Day,* 266 U. S. 71, and *Cudahy Packing Co.* v. *Hinkle,* 278 U. S. 460.

The discussion in this Reply Brief of the theory now offered by the Attorney General of Illinois in his brief, may also be considered as covering the comments in the *Hump-Hairpin* case from which the Attorney General has got his theory.

Counsel then cites the case of *Underwood Typewriter Co.* v. *Chamberlain,* 254 U. S. 113. That case is clearly distinguishable from the present case. The tax there was computed upon the proportion of the *net* income of the foreign corporation which the value of its real and tangible personal property in the state bore to such property of the corporation everywhere. Such a tax falls within one of the clearly recognized exceptions.

As this Court stated in *U. S. Glue Co.* v. *Oak Creek,* 247 U. S. 321:

> "The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected, and a charge that is only indirect and incidental."

In addition, this Court pointed out in the *Underwood* case that:

> "The payment of the tax was not made a condition of the right to carry on the business, but its enforcement was left to the ordinary means of collecting taxes."

The case of *Gilliland Oil Co.* v. *Arkansas,* 274 U. S. 717, cited for Respondent (Brief, p. 16), was decided by this

Court in a *per curiam* decision on the authority of *Roberts & Schaefer* v. *Emmerson*, 271 U. S. 50; *St. Louis, South Western Railway Co.* v. *Arkansas*, 235 U. S. 350 and *Harris* v. *Bell*, 254 U. S. 103. The statements as to the business of the corporation set forth on page 16 of respondent's brief do not appear either in this Court's opinion or in the opinion of the Supreme Court of Arkansas, 117 Ark. 415.

The fourth case relied upon is *International Shoe Co.* v. *Shartel*, 279 U. S. 429. This Court there held a statute of the State of Missouri valid which imposed a franchise tax on the proportion of the outstanding capital stock and surplus of a foreign corporation that its property and assets in the state bore to all its property and assets wherever located. No-par value stock was taxed on the basis of $100 a share.

One of the objections urged against this tax was that it burdened the interstate commerce of the foreign corporation. This Court said:

> "A franchise tax imposed on a corporation, foreign or domestic, for the privilege of doing a local business, if apportioned to business done or property owned within the state, is not invalid under the commerce clause merely because a part of the property or capital included in computing the tax is used by it in interstate commerce. *St. Louis-San Francisco Ry.* v. *Middlekamp*, 256 U. S. 226, 231 (ruling on the Missouri franchise tax); *Hump Hairpin Co.* v. *Emmerson*, 258 U. S. 290; *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. 113, 119; *St. Louis Southwestern Ry. Co.* v. *Arkansas*, 235 U. S. 350; *Kansas City, etc. Railway Co.* v. *Botkin*, 240 U. S. 227; *Kansas City, etc. R. R. Co.* v. *Stiles*, 242 U. S. 111; *Southern Railway Co.* v. *Watts*, 260 U. S. 519; *cf. United States Glue Co.* v. *Oak Creek*, 247 U. S. 321; *Shaffer* v. *Carter*, 252 U. S. 37. The tax is distinguishable from those considered in *Air-Way Electric Appliance Corporation* v. *Day*, 266 U. S. 71, *Looney* v. *Crane Co.*, 245 U. S. 178, and *Cudahy Packing Co.* v. *Hinkle*, 278 U. S. 460, which either were measured by authorized instead of issued capital stock or were not limited to the part of the capital stock justly apportioned to the taxing state."

A consideration of the cases cited by this Court in the above paragraph, clearly shows the proper distinction.

Of the cases cited, *St. Louis-San Francisco Ry.* v. *Middlekamp*, 256 U. S. 226; *Kansas City R. R. Co.* v. *Stiles*, 242 U. S. 111, and *Kansas City, etc. Railway Co.* v. *Botkin*,, 240 U. S. 227, involved taxes on domestic corporations. The tax in all of those cases was on the privilege of being a corporation, not on the privilege of doing business within the state by a foreign corporation.

The cases of *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. 113, *United States Glue Co.* v. *Oak Creek*, 247 U. S. 321, and *Shaffer* v. *Carter*, 252 U. S. 37, involved taxes on *net* income. The distinction between such cases and the present case have already been pointed out.

In *Southern Railway* v. *Watts*, 260 U. S. 519, the franchise tax was based on the property of the corporation within the state. In *St. Louis, S. W. Ry. Co.* v. *Arkansas*, 235 U. S. 350, the tax was on the proportion of the outstanding stock represented by property owned and used in business transacted in the state.

There is no connection between these cases and the present case where interstate commerce is included as business within the state. The present case is a case where the tax is not limited to the part of the capital stock justly apportioned to the taxing state.

It should particularly be noted that this Court expressly distinguished the tax involved in the *Shartel* case from that in *Airway Electrical Appliance Corp.* v. *Day*, 266 U. S. 71; *Looney* v. *Crane*, 245 U. S. 178; and *Cudahy Packing Co.* v. *Hinkle*, 278 U. S. 460.

These latter cases are decisive of the present case.

Counsel for respondent, in his brief, attempts to differentiate the *Airway* case by stating that a statute which measured a tax by authorized stock was held invalid for the rea-

son that nearly seven-eighths of the stock was unissued, and by further stating that the *Airway* case involved a tax measured by a large amount of unissued stock which afforded no basis for the tax assessed, and therefore imposed an illegal burden on interstate commerce.

Counsel for respondent then states on page 28 of his brief:

> "There is no similarity between that case and the present case, in which the tax was measured by issued stock actually invested in property used in business in the State."

The business of the *Airway Corporation* was carried on in the same way as the business of the petitioner. All of the property of both corporations was located within the taxing state. Their factories were located within the taxing state, and all shipments originated within the taxing state. Seventy-two per cent of the business of the *Airway Corporation* was interstate business, consisting of shipments from Ohio to customers outside the state. Eighty-three per cent of the business of the petitioner is interstate business, consisting of shipments from Illinois to customers outside the state. The interstate business in each case is the same kind, and is entitled to the same protection. There is no more reason for saying that the interstate business of the petitioner is merely an element in its general business of manufacturing which takes place within the state, and is, therefore, business transacted within the state and subject to be taxed, than there would have been to hold the same thing in the *Airway* case.

The Ohio taxing authorities did treat all of the *Airway Corporation's* business as business transacted in Ohio, but this was reversed by the District Court of the Southern District of Ohio in 3 Fed. 2nd 369, on the ground that including the interstate business was a substantial and genuine fettering of such business.

This Court held the tax invalid on the grounds that the use of authorized stock constituted a burden on interstate

commerce and was also a denial of equal protection of the laws. On the question of interstate commerce, this Court said:

> "All plaintiff's business, intrastate and interstate, and all its property wherever located, were represented by 50,485 shares of stock outstanding. * * * The inevitable effect of the act is to tax and directly burden interstate commerce of foreign corporations permitted to do business in Ohio, and engaged in interstate commerce, *wherever the number of shares authorized, subject to the charge of five cents each, exceeds the number of outstanding shares attributable to or represented by the corporation's property and business in that state.* In this case, the fee fixed by the commission was based on nearly eight times the number of outstanding shares, and that determined by the court on nearly six times that number. *As some of the outstanding shares are represented by plaintiff's interstate business,* the application of the rate to all the shares, or to a number greater than the total outstanding, necessarily amounts to a tax and direct burden upon all the property and business, including the interstate commerce of the plaintiff."

(The italics in the above quotation are made by counsel for petitioner.)

This decision is directly applicable to the present case. The inevitable effect of a tax is to directly burden interstate commerce wherever the number of shares subject to the tax (whether authorized or issued) exceeds the number of outstanding shares "attributable to or represented by the corporation's property and business in that State." Interstate commerce is burdened wherever the tax is placed on more shares than the proportion represented by business and property within the state.

The interstate commerce was the same kind of interstate commerce as in our case. The Court said that some of the *outstanding shares* represented this interstate business. If it were some peculiar kind of interstate commerce which was not entitled to protection, it would not be burdened even

though the tax was placed on all of the stock. This is what would be done under respondent's theory in every case where the business originates within the taxing state; and it is what is being done in the present case (except for 2/10 of 1% of the stock of petitioner represented by property outside the State).

The holding of this Court in the *Airway* case is an express holding that interstate commerce of the kind in petitioner's case is entitled to protection.

This Court expressly held in the *Airway* case that the interstate commerce of the company was represented by some of the outstanding stock of the corporation. The interstate business of the petitioner is represented by part of the outstanding stock of petitioner. From the method of determining the proportion we can determine exactly what part of the outstanding stock of petitioner represents this interstate commerce. The formulas for determining this are set out in our original brief, pages 14 and 15.

Forty-seven and six-tenths per cent of petitioner's capital stock represents its interstate business.

Under the *Airway* case the interstate business of petitioner is burdened:

> "Wherever the number of shares subject to the tax exceeds the number of outstanding shares attributable to or represented by the corporation's property and business in that state."

The decisions of this Court holding that a tax on all of the stock of a foreign corporation which is engaged in interstate commerce, necessarily involves a burden on interstate commerce are directly applicable to the present case. In all of these cases, including *Western Union Co.* v. *Kansas*, 216 U. S. 1; *Pullman Co.* v. *Kansas*, 216 U. S. 57; *Looney* v. *Crane Co.*, 245 U. S. 178; *International Paper Co.* v. *Massachusetts*, 246 U. S. 135, and *Cudahy Packing Co.* v. *Hinkle*, 278 U. S. 460, this Court expressly held that such a tax was a burden

on the interstate commerce of the foreign corporation. The reason is clearly stated in *International Paper Co.* v. *Massachusetts*, 246 U. S. 135 at 142, as:

> "The capital stock of the corporation represents all its business of every class and all its property wherever located".

Counsel for respondent attempts to distinguish these cases on the ground that in all of them the foreign corporation had property in other states and did interstate business in other states than the taxing state. These cases were expressly followed and applied in the *Airway* case where the interstate commerce was transacted in exactly the same manner as in the present case. The Court in these cases did not make any distinction between the interstate commerce originating in the taxing state and the interstate commerce carried on by the foreign corporation which did not touch the taxing state; and this Court in the *Airway* case has shown that there is no basis for such a distinction.

We have shown in our original brief that the decision of the *Hump Hairpin Manufacturing Corporation* v. *Emmerson* is not decisive of the present case, and we have shown in that brief, pages 25 and 26, that the cases cited in the *Hump Hairpin* case involved taxes which fell within certain defined exceptions enumerated by this Court with the solitary exception of *Baltic Mining Co.* v. *Massachusetts*, 231 U. S. 68, which case has since been disapproved by this Court in *Alpha Portland Cement Co.* v. *Massachusetts*, 268 U. S. 203 and *Cudahy Packing Company* v. *Hinkle*, 278 U. S. 460.

These later decisions of this Court, together with the decision of the *Airway Electric Appliance Corp.* v. *Day*, 266 U. S. 71, are decisive of the present case. They have all been decided since the *Hump Hairpin* case and they all follow the clear decisions of this Court in the line of cases starting with *Western Union* v. *Kansas*, 216 U. S. 1, and continuing down

through *Looney* v. *Crane Co.*, 245 U. S. and *International Paper Co.* v. *Massachusetts*, 246 U. S. 135. These cases, as followed and applied in the *Airway* case and in *Cudahy* v. *Hinkle*, necessitate the tax in the present case being held invalid. It is based on all of the stock of the foreign corporation, except a small number of shares attributed to property outside the state. The interstate commerce of petitioner is represented by part of the stock so taxed. This interstate commerce is the same kind of interstate commerce as was protected by this Court in the *Airway* case.

Counsel for respondent argues that the same kind of treatment is shown to foreign corporations as is accorded to domestic corporations. This will not validate the tax if the interstate commerce of foreign corporations is burdened.

He also states that the tax does not vary directly with the amount of interstate commerce and does not increase or decrease in proportion t the amount of such commerce. We did not contend, in our original brief, that the tax itself would vary with the amounts of interstate commerce transacted by the corporation. Where the tax is laid on all of the stock, including that represented by interstate commerce, it cannot increase, regardless of any increase in the amount of business.

The more interstate commerce the corporation transacts, the greater is the proportion of the outstanding stock which represents that commerce. The burden increases directly with the amount of interstate commerce transacted by the corporation.

The tax in this case is a tax for the privilege of doing business within the state. Under the Corporation Law of Illinois a corporation failing to pay this tax is liable to be proceeded against for revocation of its license to do business. It is not allowed to file any papers in the office of the secretary of

state, nor transact any business, or maintain any action at law or equity within the state. The payment of the tax is made a condition of the right to do business. The State now requires the corporation to submit to a tax on its interstate business as a condition to the right to do a local business within the state.

The entire case for the respondent is based on the theory that the interstate commerce of petitioner is not entitled to protection and may be taxed by the State of Illinois because the property of petitioner is located in Illinois and because, as he contends, the interstate transactions of sale are a part of the manufacture within the state of the products of petitioner.

This Court in *Airway Electric Appliance Corp.* v. *Day*, 266 U. S. 71, has held otherwise. A foreign corporation having its factories and all of its property located within a state and engaged in interstate commerce originating within that state is not engaged in a form of interstate commerce which may be taxed by that state.

The petitioner is a foreign corporation engaged in interstate commerce. It is taxed on 99-8/10 of its issued capital stock. Its interstate commerce is included as business transacted in Illinois in determining the proportion of its capital stock represented by property located and business transacted in Illinois. The tax so imposed is a burden on its interstate commerce and that burden is invalid.

As this Court stated in *St. Louis Southwestern Ry. Co.* v. *Arkansas*, 235 U. S. 350:

> "But when the question is whether a tax imposed by a State deprives a party of rights secured by the Federal Constitution, the decision is not dependent upon the form in which the taxing scheme is cast, nor upon the characterization of that scheme as adopted by the state court. We must regard the substance, rather than the form,

and the controlling test is to be found in the operation and effect of the law as applied and enforced by the State."

It is respectfully submitted that the license fee or franchise tax imposed on petitioner by the State of Illinois is a direct and substantial burden on its interstate commerce and we ask that the judgment of the Supreme Court of the State of Illinois holding this tax valid be reversed.

Respectfully submitted,

COLIN C. H. FYFFE,
Counsel for Petitioner.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1929.

No. 375

WESTERN CARTRIDGE COMPANY, A CORPORATON,
Petitioner,

VS.

LOUIS L. EMMERSON, (WILLIAM J. STRATTON)
SECRETARY OF STATE OF THE STATE OF ILLINOIS,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OSCAR E. CARLSTROM,
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PHILLIPS BROS.' PRINT.
SPRINGFIELD, ILLINOIS.

(24961—75)

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1929.

No. 375

WESTERN CARTRIDGE COMPANY, A CORPORATON,
Petitioner,

VS.

LOUIS L. EMMERSON, (WILLIAM J. STRATTON)
SECRETARY OF STATE OF THE STATE OF ILLINOIS,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

This case involves the right of the State of Illinois to impose an annual license fee or franchise tax upon a foreign corporation for the privilege of doing business in that State during the year commencing July 1, 1927. The opinion of the Supreme Court of Illinois, in rendering the judgment sought to be reviewed here, is reported in 335 Ill., 150 (Advance Sheets). See also, R. 16-22.

The license fee or tax was computed upon the pro-

portion of the issued capital stock represented by business transacted and property located in Illinois, as provided by Section 105 of the General Corporation Act of that State. The bill of complaint shows that the corporation had issued capital stock in the par value amount of $5,701,800, and that the total amount of its property was $6,924,804.92, nearly all of which was located in Illinois, and all of its business was transacted in that State. The fee or tax computed upon the proportion of capital stock represented by such property and business amounted to the sum of $2,808.03 (R. 1).

The cause was heard upon the bill and answer and a stiuplation on a statement of facts by the petitioner. This statement showed that the petitioner is engaged in the manufacture and sale of small arms, ammunition and brasses. Both its offices and factories are located in Illinois, and all of its goods are manufactured at such factories in that State. Orders or offers for the purchase of such goods are received by it at its office in East Alton, Illinois, and accepted at that office, and the goods are then packed and shipped from its factories in Illinois to the purchasers in that and other states (R. 8-9).

The bill and statement alleged that $1,919,882.73, or about one-sixth of the total amount of sales were of goods sold and shipped to residents of Illinois, and the remainder of the goods sold were shipped to points outside of the State. The petitioner contended that the sale of goods to purchasers outside of the State consti-

tuted interstate commerce and that such business could not be considered in computing its tax. The Secretary of State, however, considered all such sales as part of the business transacted in Illinois, in determining the proportion of the capital stock represented by business transacted and property located in that State (R. 6-8).

Upon the hearing, the trial court sustained the position of the Secretary of State and dismissed the bill of complaint for want of equity. An appeal was taken by the petitioner to the Supreme Court of Illinois, which affirmed the decree of the lower court, pursuant to the prior decision of that Court and of this Court in the case of *Hump Hairpin Mfg. Co.* vs. *Emmerson*, 258 U. S., 290, and other cases. A petition for rehearing was denied by that Court on June 6, 1929, and the petitioner now seeks by its petition to have that decision reviewed by this Court (R. 10, 15-25).

The petitioner here urges only that the inclusion of the alleged interstate commerce consisting of the sale of goods manufactured and sold in Illinois to purchasers in other states, in computing its annual license fee or franchise tax, constituted a direct and substantial burden on its interstate commerce, contrary to the commerce clause of the Federal Constitution. This contention is admittedly contrary to the decision of this Court in the *Hump Hairpin* case, supra, but it is further contended that such decision is modified or overruled by certain later decisions of this Court.

The position of respondent is that the license fee or tax imposed upon the petitioner did not constitute a direct or substantial burden upon any interstate commerce, and that the decision of the Supreme Court of Illinois, pursuant to the decision of this Court in the *Hump Hairpin* case, is correct, and that such decision is not in any way modified or overruled by any of the later decisions of this Court.

POINTS AND AUTHORITIES.

I.

The computation of the annual license fee or franchise tax upon the proportion of issued capital stock represented by property located and business transacted in Illinois, including sales of goods manufactured and sold at places of business in that state, did not impose any direct or substantial burden on interstate commerce, contrary to the commerce clause.

General Corporation Act, Ill. Rev. Stat., Chap. 32, Sec. 105;
Hump Hairpin Mfg. Co. vs. *Emmerson*, 258 U. S., 290, 294-5;
Underwood Typewriter Co. vs. *Chamberlin*, 254 U. S., 113;
U. S. Glue Co. vs. *Oak Creek*, 247 U. S., 321;
Kansas Citq, etc., R. R. Co. vs. *Stiles*, 242 U. S., 111;
Kansas City, etc., R. R. Co. vs. *Botkin*, 240 U. S., 227;
St. Louis S. W. Ry. Co. vs. *Arkansas*, 235 U. S., 350;
International Shoe Co. vs. *Shartel*, 279 U. S., 429, 433.

The petitioner is a manufacturing corporation, with both of its offices and factories in Illinois. All of its business is transacted at such places of business in Illinois, and nearly all of its property is located in that State. The small portion of its property outside the State was not considered in computing its tax.

The business of petitioner did not consist merely in the sale and final disposition of its goods, but included the use of its large amount of property in Illinois in manufacturing such goods, the receipt and acceptance of orders or offers for such goods at its offices in that State, and the shipment of such goods from its factories there to various points in that and other states. Such business was therefore transacted entirely in Illinois, and only the final delivery of part of the goods outside of that State had any element of interstate commerce.

The assumption that any business which has some element or feature of interstate commerce cannot be considered in computing a franchise tax is not in accordance with the decisions of this Court. On the contrary, an excise or franchise tax has been repeatedly upheld, where business which had some feature of interstate commerce, or the proceeds of such business, have been used as one of the elements in determining the amount upon which such a tax may be computed. In the case of *Hump Hairpin Mfg. Co.* vs. *Emmerson*, 258 U. S., 290, after citing several cases which upheld that proposition, this Court said, at pages 294-5:

> "The turning point of these decisions is whether, in its incidence, the tax affects interstate commerce so directly and immediately as to amount to a genuine and substantial regulation of, or restraint upon it, or whether it affects it only incidentally or remotely, so that the tax is not in reality a burden, although in form it may touch, and in fact, distantly affect it."

The facts in that case were substantially the same as the facts in the present case The Court there pointed out that the tax was not imposed directly upon the proceeds of interstate commerce, but that the amount of interstate sales was only one of three factors used, the other two factors being the large amount of property used in Illinois, and the proceeds from sales to residents of that State. It was further held that the fee or tax was reasonable in amount, and that if the same amount of tax had been imposed upon such a manufacturing corporation, for the privilege of doing business in the State, without reference to the basis of computation, or if it had been imposed as an income tax, a part of which would have been derived from the net profits on such business, no valid objection could have been made to it. At the most, it was held that the assessment, so far as interstate commerce was concerned, was incidental, remote and unimportant and that it was therefore constitutional and valid.

This decision expressly sustained the prior decisions of the Supreme Court of Illinois in that and other cases, and is directly in point here, as shown by the opinion of that Court in the present case (R. 16-22). That Court therefore properly held that the former case is decisive and sustained the validity of the statute and the amount of tax assessed in the present case.

The petitioner here, as in the State Court, urges that the prior decisions of this Court in the *Hump Hairpin* case have been in effect overruled by subsequent decisions of this Court. It seems apparent that none of the decisions in the cases mentioned are applicable here. In the *Western Union* and *Pullman* cases involving the Kansas statute, *Looney* vs. *Crane Co.* case on the Texas statute and the *International Paper Company* case involving the amended Massachuetts statute, those states sought to impose a franchise tax measured by the entire authorized capital stock of foreign corporations having a large amount of interstate commerce and property in other states, which this Court held imposed a substantial burden on interstate commerce and taxed property in such other states.

In the *Airway* case, the State of Ohio sought to impose a franchise tax measured by a large amount of authorized capital stock of no par value, nearly seven-eighths of which had not been issued and which the Court held did not represent any property or business of the corporation anywhere. In the *Cudahy Packing Company* case, the statute likewise sought to impose a franchise tax measured by authorized capital stock, a substantial part of which was unissued.

It is apparent that none of these cases has any application to the present case. They are distinguishable from the basis on which the tax here is assessed, as held

by this Court in the case of *International Shoe Co.* vs. *Shartel,* supra, on the ground that the tax in those cases was measured by authorized instead of issued capital stock, or was not limited to that part of the capital stock justly apportioned to the taxing state on account of property located and business transacted in such State.

The statement quoted from the opinion in *the Alpha Portland Cement Company* case, has no reference whatever to the decision in the *Hump Hairpin* case, but refers only to language used in the case of *Baltic Mining Co.* vs. *Mass.,* 231 U. S., 68, at 87, where a tax measured by the entire authorized capital stock of a foreign corporation, which had a large amount of property and business in other states, was upheld on the ground that the statute limited the tax to a maximum amount. This limitation had no effect on corporations having a capital stock of less than $10,000,000 and the later case held that it did not provide a proper basis for computing the tax against such corporations. The statement mentioned obviously can have no application or reference to the *Hump Hairpin* case.

II.

The rule adopted by this Court is that while the State may not regulate or impose a burden upon interstate commerce, it may levy a tax within its authority, measured by the capital stock in part used in such commerce, where the circumstances are such as to indicate no purpose or necessary effect in the tax imposed to burden commerce of that character.

Hump Hairpin Mfg. Co. vs. *Emmerson,* 258 U. S., 290;
Underwood Typewriter Co. vs. *Chamberlin,* 254 U. S., 113;
St. Louis Southwestern Ry. Co. vs. *Arkansas,* 235 U. S., 350;
Chaney Bros. Co. vs. *Mass.,* 246 U. S., 147;
U. S. Glue Co. vs. *Oak Creek,* 247 U. S., 321;
Northwestern Life Ins Co. vs. *Wisconsin,* 247 U. S., 132;
Peck & Co. vs. *Lowe,* 247 U. S., 165;
Maine vs. *Grand Trunk Ry. Co.,* 142 U. S., 217;
Wisconsin, etc., Ry. Co. vs. *Powers,* 191 U. S., 379;
Flint vs. *Stone Tracy Co.,* 220 U. S., 107;
United States Express Co. vs. *Minnesota,* 223 U. S., 335;
Kansas City, Ft. S. & M. Ry. Co. vs. *Kansas,* 240 U. S., 227;
Kansas City, M. & B. R. R. Co. vs. *Stiles,* 242 U. S., 111;
Gilliland Oil Co. vs. *State,* 274 U. S., 717.

In the *Hump Hairpin* case, *supra,* this Court referred to the case of *American Can Co.* vs. *Emmerson,* 288 Ill., 289, in which the Supreme Court of Illinois held that it has been the policy of that State since 1872 to accord precisely equal treatment to domestic and foreign corporations of like character, and that the fees for

transacting business in the State were computed on the amount of capital stock of foreign corporations actually represented by property located and business transacted in the State, as determined by the Secretary of State under the statute.

In referring to those cases in the instant case, the Supreme Court of Illinois in its opinion shows that the fee or tax under the present statute is computed on exactly the same basis as provided by the prior statute, and that therefore such decisions are directly applicable to the present case. Both the statute and the decisions of the Supreme Court sustain the same principles that were applied and approved in those cases.

In the petition herein, the use of a large amount of property in carrying on its business in Illinois is ignored by the petitioner. As pointed out by the Court in the *Hump Hairpin* case, if the tax were computed only on the property admitted to have been used in the State, it would have been but slightly less than the amount collected. In the present case, it would exceed the amount collected, as the amount of property used in the State exceeds the total par value amount of the capital stock of the corporation.

The petition herein compares the result of the formula said to be used by the Secretary of State with the result which would be obtained if only the amount of sales made within the State were included. The petitioner thus ignores the business carried on by it in its

manufacturing operations, making contracts for sales and shipment of goods, all of which are carried on at its places of business in the State. The omission of such business of course leads to an incorrect result and renders the comparison valueless.

This Court considered all of the facts involved in carrying on such a business in the *Hump Hairpin* case, and held that under such facts, the tax involved was valid, even though that part of the business consisting of sales to residents of other states be regarded as interstate business. It was further held that the statute clearly is not a disguised attempt to tax interstate commerce and does not have that effect, but only requires foreign corporations to pay a reasonable fee for the privilege of doing business in the State.

This decision is sustained by many other decisions of this Court in similar cases. The Court referred especially to *U. S. Glue Co.* vs. *Oak Creek*, 247 U. S., 321, as supporting its decision. A tax was there imposed upon the proportion of income which was derived from business transacted and property located within the State. It was contended that the part of the tax imposed upon income derived from goods sold and shipped to persons in other states was a burden upon interstate commerce, but the Court held that such a tax could not be deemed so direct a burden as to render it invalid.

In the case of *Underwood Typewriter Co.* vs. *Chamberlin*, 254 U. S., 113, a tax was computed upon the proposition of the whole net income of a foreign corporation

which the value of its tangible property in the State bore to all of its property everywhere. All its manufacturing was done in the State and under this formula 47% of its profits were allocated to that State, although only a little over 3% of such profits were made from sales in that State. The Court held that such profits were earned largely by the use of property within the State and that a tax measured by such profits was entirely valid, even though derived in part or mainly from interstate commerce.

In the recent case of *Gilliland Oil Co.* vs. *Arkansas*, 274 U. S., 717, this Court in a *per curiam* opinion approved the decision of the Arkansas Supreme Court on the authority of the *Underwood Typewriter Company* case and other cases. The statute there imposed a tax measured by the proportion of no par value capital stock taken at $25 per share represented by property owned and business transacted in the State. It was stipulated in the record in that case that more than 50% of the products of the corporation in the State were sold and transported by it in interstate commerce and it was contended that the inclusion of the amount of such sales in computing the tax imposed a burden upon interstate commerce, but the Court held that it did not have that effect.

The recent decision of this Court in *International Shoe Co.* vs. *Shartel*, 279 U. S., 429, likewise in effect

sustains the decision in the present case. A large number of cases are cited at page 433 in that case, in support of the principle here involved, and certain other cases which are relied on by the petitioner here, are distinguished as involving statutes which imposed a tax on a different basis.

The provisions of the statute here involved, as construed and applied by the Supreme Court of Illinois in the present case, have been directly approved and upheld by this Court in the *Hump Hairpin* case. That decision and the principles there stated have never been overruled or questioned in any later case, but have been sustained and applied in many prior and subsequent cases. As there stated, the principle involved in such cases has been so repeatedly sustained that it must be regarded as the settled law, and it should be applied in all subsequent cases of the same character. It is therefore urged that the petition herein be denied.

Respectfully submitted,

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BAYARD LACEY CATRON,
Assistant Attorney General;
Counsel for Respondent.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1929.

No. 375

WESTERN CARTRIDGE COMPANY, A CORPORATION,
Petitioner,

VS.

LOUIS L. EMMERSON, SECRETARY OF STATE OF THE STATE OF ILLINOIS,
Respondent.

STATEMENT, BRIEF AND ARGUMENT FOR RESPONDENT.

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23901—60

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No. 375

WESTERN CARTRIDGE COMPANY, A CORPORATION,
Petitioner,

VS.

LOUIS L. EMMERSON, SECRETARY OF STATE OF THE STATE OF ILLINOIS,
Respondent.

STATEMENT, BRIEF AND ARGUMENT FOR RESPONDENT.

STATEMENT OF THE CASE.

MAY IT PLEASE THE COURT:

This case involves the annual license fee or franchise tax imposed by the State of Illinois upon the petitioner for the privilege of carrying on its corporate business in that State for the year commencing July 1, 1927. The Supreme Court of Illinois sustained the validity of the statute and the tax assessed under the pre-

vious decisions of this Court as well as that Court in the case of *Hump Hairpin Mfg. Co.* v. *Emmerson,* 258 U. S., 290, and other cases cited (335 Ill., 150.)

Section 105 of the Illinois Corporation Act, under which the tax in question was assessed, is set forth in the statement of the case by the petitioner. In brief, that section provides that the annual license fee or franchise tax of both domestic and foreign corporations shall be computed at the rate of five cents on each one hundred dollars of the proportion of the issued capital stock represented by business transacted and property located in that State.

The bill of complaint filed by the petitioner shows that it has issued capital stock in the par value amount of $5,701,800. The total amounts of its property was $6,924,804.92, nearly all of which was located in the State of Illinois. Its total business in the preceding year was $11,670,925.51, all of which was transacted at or from its places of business in that State. The annual fee or tax, as computed upon the proportion of capital stock represented by such property and business in that State amounted to $2,808.03. (R. 1.)

In its annual report, the petitioner sought to divide the business transacted by it at or from places of business in Illinois, according to sales made to purchasers

within the State amounting to $1,919,882.73, and the remainder of sales made to purchasers outside the State. In its bill herein, the petitioner alleged that the latter amount should not be included in determining the proportion of its capital stock represented by business transacted and property located in Illinois. The answer of the respondent denied the material allegations of the bill in that respect. (R. 10-12.)

The case was heard upon the bill and answer and a statement of facts made by the petitioner, under a stipulation that such statement might be considered as evidence of such facts presented by the petitioner, so far as competent under the pleadings. This statement showed that the petitioner is engaged in the business of manufacturing and selling small arms ammunition and brasses, with its offices and places of business located in East Alton and Springfield, Illinois. It further showed that the total amount of its sales of such products during the preceding year was $11,670,925.51, of which $9,751,042.78, or about five-sixths of the total amount, consisted of sales made upon offers or orders for goods received at its place of business at East Alton, Illinois, which were there accepted and such goods were then shipped from one of the said factories to the purchasers outside the State. (R. 13-15.)

Since all of the manufacturing business of the petitioner was carried on at its factories in Illinois and its products were shipped from such factories upon orders received and accepted at its offices in that State, the respondent considered all such sales as a part or measure of the business transacted in Illinois. All such business was therefore included as one of the factors in determining the proportion of capital stock represented by the property and business in that State.

Under the formula set forth in Section 106 of the Illinois Corporation Act, the sum of the business transacted and property located in that State is divided by the sum of the total business and property of the corporation everywhere, for the purpose of ascertaining the proportion of its capital stock represented or used in that State. The amount of sales made to residents of other states was therefore only one of the three factors used in determining the proportion of capital stock represented or used in the State, the other two factors being the amount of sales made to purchasers within the State and the amount of property located and used in that State.

Upon the hearing, the trial court sustained the statute and the tax assessed by the Secretary of State and dismissed the bill for want of equity. An appeal was then taken by the petitioner to the Supreme Court of Illinois, which held that the decision of this Court in

the similar case of *Hump Hairpin Mfg. Co.* v. *Emmerson*, 258 U. S., 290, which sustained the prior decision of that Court (293 Ill., 387), was controlling in this case, and therefore the decree of the Circuit Court was affirmed.

The position of the respondent here is that all of the business of the petitioner was in fact carried on at its factories and offices in the State of Illinois, and that the amount of sales made was merely taken as a measure or index of the amount of business transacted in that State; that such business, together with the amount of property in Illinois, represented the proportion of capital stock used in that State, upon which the annual franchise tax of petitioner was computed; that a tax assessed in that manner is not a direct tax upon interstate commerce, and did not constitute an illegal burden on any such business of the petitioner, under the prior decisions of this Court.

SUMMARY OF ARGUMENT.

I.

The tax assessed was properly computed under the statute and is constitutional and valid.

The Secretary of State properly considered the amount of sales made by the petitioner at its place of business in Illinois, as showing or measuring the amount of business transacted by it in that State, together with its property located in that State and used in such business, for the purpose of determining the proportion of its capital stock represented by business transacted and property located in that State, upon which its annual license fee or franchise tax was computed.

General Corporation Act, Chap. 32, Secs. 105, 106;

Hump Hairpin Mfg. Co. v. *Emmerson,* 258 U. S., 290, 292, 294; affirming 293 Ill., 387;

American Can Co. v. *Emmerson,* 288 Ill., 289;

Underwood Typewriter Co. v. *Chamberlain,* 254 U. S., 113, 116;

United States Glue Co. v. *Oak Creek,* 247 U. S., 321;

Peck & Co. v. *Lowe,* 247 U. S., 165;

Gilliland Oil Co. v. *State,* 274 U. S., 717; affirming 171 Ark., 415;

International Shoe Co. v. *Shartel,* 279 U. S., 429, 433.

II.

The amount of the business transacted by the petitioner in Illinois was properly ascertained or measured by the amount of sales made of its products at or from its places of business in that state.

The manufacturing operations of the petitioner at its factories in Illinois, the receipt and acceptances of offers or orders for its products at its offices in that State and the shipment of such products from said factories constituted the transaction of business in that State, and the amount of the sales of such products was properly taken as the measure of the amount of such business for the purpose of computing its franchise tax, even though part of such sales were made to residents of other states.

Hump Hairpin Mfg. Co. v. *Emmerson*, 258 U. S., 290, 294; affirming 293 Ill., 387;

Underwood Typewriter Co. v. *Chamberlain*, 254 U. S., 113, 120;

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Maine v. *Grand Trunk Ry. Co.*, 142 U. S., 217;

American Can Co. v. *Emmerson*, 288 Ill., 289.

III.

The statute and the tax assessed did not impose any direct or unlawful burden upon any interstate commerce of the petitioner.

The statute and the tax imposed in this case conform to the rule adopted by this Court that, while a state may not regulate interstate commerce or impose a burden upon it, the state may levy a tax within its authority, measured by capital stock in part used in carrying on such commerce, where the circumstances are such as to indicate no purpose or necessary effect in the tax imposed to burden commerce of that character.

Hump Hairpin Mfg. Co. v. *Emmerson*, 258 U. S., 290, 294;

Underwood Typewriter Co. v. *Chamberlain*, 254 U. S., 113, 120;

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Kansas City M. & B. R. R. Co. v. *Stiles*, 242 U. S., 111, 119;

Kansas City, etc., Ry. Co. v. *Kansas*, 240 U. S., 227, 234;

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St. Louis, etc., Ry. Co. v. *Middlekamp*, 256 U. S., 226, 231;

International Shoe Co. v. *Shartel*, 279 U. S., 429, 433.

IV.

The decision of this Court in the Hump Hairpin case is decisive of the questions involved in the present case.

The facts in the *Hump Hairpin case* and the statute under which the tax was assessed in that case were substantially the same as those involved in the present case, and therefore the decision of this Court on the questions arising in that case are directly applicable and controlling on such questions in the present case.

Hump Hairpin Mfg. Co. v. *Emmerson*, 258 U. S., 290; 293 Ill., 387;

Western Cartridge Co. v. *Emmerson*, 335 Ill., 150; (R. 24-28);

American Can Co. v. *Emmerson*, 288 Ill., 89.

ARGUMENT.

I.

The tax assessed was properly computed under the statute and is constitutional and valid.

The petitioner is a manufacturing corporation, with both its factories and its offices located in Illinois. All of its business is carried on at such places of business in Illinois, and nearly all of its property is located in that State. The small amount of property outside of the State was not considered in computing the amount of its tax.

The business of the petitioner did not consist merely in the final disposition of its products, but included its manufacturing operations in Illinois to produce such goods, the receipt and acceptance of orders or offers for same at its offices in that State, and the shipment of such goods from its factories to purchasers in that and other states. Such business was therefore transacted entirely in Illinois and only the shipment and final delivery of part of the goods to purchasers outside that State had any element of interstate commerce.

The petitioner in its brief refers to the discussion of the nature of its business by the Supreme Court of

Illinois in its opinion in this case. The Court there pointed out that the petitioner's factories and offices were located, its manufacturing operations were conducted, orders for its goods were accepted and shipments of its products originated in that State exclusively. The Court further said, assuming that sales made to residents of other states was interstate business, the fee or tax was not directly imposed or computed upon the proceeds of interstate commerce; that under the statute, other factors necessarily entered into the calculation in determining the proportion of capital stock represented by business transacted and property located in Illinois, and that the tax computed upon such proportion of the capital stock did not constitute a direct or substantial burden upon interstate commerce (R. 28).

That Court also showed that the exact question presented here was considered and decided by this Court in the case of *Hump Hairpin Mfg. Co.* v. *Emmerson*, 258 U. S., 290. That case involved a foreign corporation which had its factories and office located in the City of Chicago, where it received and accepted orders for goods sold and shipped such goods to the purchasers in Illinois and other states. The total amount of sales in business during the preceding years was $260,334.96, of which sales made to residents of that State amounted to $25,814,

and the remainder of its sales, being more than nine-tenths of its total sales, were made to residents outside of that State. The Illinois Supreme Court held that all such business was transacted in that State, within the meaning of the Corporation Act, although sales to residents outside the State had some element of interstate commerce, and as all of the property was in Illinois, it was held that the entire amount of capital stock was represented by property located and business transacted in that State (293 Ill. 387, 391).

The corporation in that case brought the case up for review by this Court and urged that the inclusion of all of its business in computing its tax imposed a burden upon its interstate commerce. This Court in its opinion referred to the policy of the State to accord equal treatment to foreign and domestic corporations and discussed the provisions of the statute as applied by the Secretary of State. The Court said that the fact that all of the property of the corporation was located in Illinois and all its manufacturing operations were carried on in that State, and all contracts for sales were approved at its office in that State, certainly reduced the interstate element in its business to the lowest terms. The question therefore was whether the inclusion of such business in determining the amount of tax rendered it invalid.

In considering that question, this Court said that while a state may not use its taxing power to regulate or burden interstate commerce, it is settled that a state excise tax which affects such commerce only incidentally and remotely may be entirely valid, where it is clear that it is not imposed with the covert purpose or the effect of defeating Federal constitutional rights. After stating that taxes have been so repeatedly sustained where the proceeds of interstate commerce have been used as one of the elements in determining the amount of a fund on which the tax is assessed, that the principle of such cases must be regarded as an exception to the general rule, the Court said:

> "The turning point of these decisions is whether, in its incidence, the tax affects interstate commerce so directly and immediately as to amount to a genuine and substantial regulation of, or restraint upon it, or whether it affects it only incidentally or remotely, so that the tax is not in reality a burden, although in form it may touch, and in fact, distantly affect it.
>
> No formula has yet been devised by which it can be determined in all cases whether or not such a tax is valid; and, applying the repeated declaration of this Court, in the cases cited and in many others, that the question is inherently a practical one, depending for its decision on the special facts of each case, *we are clear that the tax here involved falls within the excepted class described, even though the business done with residents of states other than Illinois be regarded as interstate.*" (Italics ours).

The Court further showed that the statute is not a disguised attempt to tax interstate commerce and that it accords equal treatment to domestic and foreign corporations; that the tax is not imposed directly upon the proceeds of interstate commerce, and is not computed upon it, but that the proceeds of such business is only one of three factors used in determining the amount of capital stock represented by property and business in the State, upon which the tax is computed, the other two factors being the amount of property in the State and the amount of business done with residents of that State, and the Court in conclusion held that at most the assessment, so far as interstate commerce was concerned, was incidental, remote and unimportant and that it was therefore constitutional and the judgment was affirmed.

The Court in that case referred to the recent decision of the Illinois Supreme Court in *American Can Co.* v. *Emmerson,* 288 Ill., 289, in which that Court held that it had been the policy of that State since 1872 to accord precisely equal treatment to domestic and foreign corporations of like character. The Court in that case, after discussing several decisions of this Court which held in substance that the receipts or earnings derived from business, including interstate commerce, might properly be taken as the measure of the value of the business or

property in the state, for the purpose of computing a franchise tax, referred to the rule applied by this Court in such cases as follows (p. 303);

> The rule adopted by the United States Supreme Court is that while a state may not regulate interstate commerce or impose burdens upon it, it is authorized to levy a tax within its authority, measured by the capital stock in part used in the conduct of such commerce, where the circumstances are such as to indicate no purpose or necessary effect in the tax imposed to burden commerce of that character. *Kansas City Railroad Co.* v. *Stiles*, 242 U. S., 111; *Northwestern Mutual Co.* v. *Wisconsin*, 247 id, 132; *United States Glue Co.* v. *Oak Creek*, 247 id., 331; *Baldwin Tools Works* v. *Blue*, 240 Fed., 202."

The decision in the *Hump Hairpin* case is supported by several other cases there cited, in which a fund derived in part from the proceeds of interstate commerce was used in computing the tax assessed. The same principle has been applied in many subsequent cases. A leading case on this point is *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S., 113. That case involved an annual franchise tax imposed by the State of Connecticut upon the net income of manufacturing and trading corporations carrying on business in that State. The tax was computed upon the proportion of the whole net income of a foreign corporation, which the value of its real and tangible personal property in the state bore to all such property of the corporation everywhere.

All of the manufacturing business of the corporation was done in that State, as in the present case, but it had branch offices for the sale and repair of its machines in other states. Under the above formula, 47 percent of its profits were allocated to Connecticut and the tax was computed on that basis, although only a little over 3 percent of its profits were made from sales in that State. It was contended by the corporation that such a tax imposed a burden upon its interstate commerce and business in other states. The Court held, however, that the profits were earned largely by the use of property within the taxing state, and that a tax measured by such profits was entirely valid, even though derived in part or mainly from interstate commerce.

This Court has also sustained a similar tax assessed in several later cases cited in our brief. In the recent case of *Gilliland Oil Co.* v. *Arkansas*, 274 U. S., 717, this Court sustained the validity of the Arkansas statute, which imposed a franchise tax measured by property owned and business transacted in that State, taking no par value stock at $25 per share. It was stipulated in the record in that case that more than 50 percent of the products of the corporation in that State were sold and transported by it in interstate commerce. The corporation contended that the inclusion of the amount of such

sales as business transacted in the State in computing its tax imposed a burden on its interstate commerce. The Arkansas Supreme Court upheld the validity of the statute and the tax assessed on that basis (171 Ark., 415), and that decision was affirmed by this Court in a *per curiam* order, on the authority of *Underwood Typewriter Co.* v. *Chamberlain* and other cases cited.

The very recent decision of this Court in *International Shoe Co.* v. *Shartel*, 279 U. S., 429, likewise supports the decision in the present case. The Missouri statute in that case imposed an annual franchise tax on the outstanding capital stock and surplus employed in business by the corporation within the State. For the purpose of ascertaining the amount of the tax, a corporation was deemed to have employed within the State "that proportion of its entire capital stock and surplus that its property and assets in the State bears to all its property and assets wherever located." (p. 431). In considering the objection that the tax computed on that basis imposed a burden on the interstate commerce in which the corporation was engaged, the Court said, at page 433:

> "A franchise tax imposed on a corporation, foreign or domestic, for the privilege of doing a local business, if apportioned to business done or property owned within the state, is not invalid under the commerce clause merely because a part of the property or capital included in computing the tax is used by it in interstate commerce. *St. Louis-San Francisco Ry.* v. *Middlekamp*, 256 U. S., 226, 231; *Hump Hair-*

pin Co. v. *Emmerson*, 258 U. S., 290; *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S., 113, 119; *St. Louis Southwestern Ry. Co.* v. *Arkansas*, 235 U. S., 350; *Kansas City, &c. Railway Co.* v. *Botkin*, 240 U. S., 227; *Kansas City &c. R. R. Co.* v. *Stiles*, 242 U. S., 111; *Southern Railway Co.* v. *Watts*, 260 U. S., 519; cf. *United States Glue Co.* v. *Oak Creek*, 247 U. S., 321; *Shaffer* v. *Carter*, 252 U. S., 37."

In view of the approval in this recent decision by the Court of the cases above cited, including the *Hump Hairpin* case, in which the Illinois statute was directly upheld in a case similar in every respect to the present case, it appears that a further discussion of the other cases cited is unnecessary. These decisions were controlling upon the Illinois Supreme Court and were therefore properly followed by that Court in this case.

II.

The amount of the business transacted by the petitioner in Illinois was properly ascertained or measured by the amount of sales made of its products at or from its places of business in that State.

The petitioner under Point II of its Brief cites several cases in support of the statement that transactions consisting of shipments of goods from Illinois to purchasers in other states are interstate commerce, citing the *Hump Hairpin* case and other cases. It is further said that the Supreme Court of Illinois in its opinion admitted that such business was interstate commerce, but

"seemed to be influenced by the facts that the factories and offices of petitioner were located in Illinois, that its manufacturing operations were conducted there, and that orders were accepted and shipments originated there."

This Court held in the *Hump Hairpin* case that such facts were sufficient to justify the inclusion of such business in determining the amount of tax to be assessed, and that such a tax did not impose any direct or substantial burden upon interstate commerce. It has been repeatedly held in many cases that a franchise tax may be entirely valid, although measured by a fund in part derived from the proceeds of interstate commerce, or by property or capital used in part in such commerce.

None of the other cases cited by the petitioner are based upon any similar state of facts. In *Heyman* v. *Hayes,* 236 U. S., 178, a mail order business consisting simply in the shipment of liquor from Tennessee to purchasers in other states was held not subject to a tax. In *Crew Levick Co.* v. *Pennsylvania,* 245 U. S., 292, it was likewise held that a corporation which merely sold and delivered merchandise at wholesale from its warehouse in that State to purchasers in other states, was not subject to an annual mercantile license tax on such business.

In *Eureka Pipeline Co.* v. *Hallanan,* 257 U. S., 365, a statute which sought to impose a state tax upon the

transportation of oil by pipeline was held invalid, so far as it was measured by quantities received in but moving out of the state. In *Airway Electric Appliance Corp.* v. *Day,* 266 U. S., 71, a statute of Ohio which measured a tax by authorized capital stock was held invalid for the reason that nearly seven-eighths of which was unissued. In the last case cited, *New Jersey Bell Telephone Co.* v. *State Board of Taxes and Assessments,* a tax measured by the proportion of gross earnings represented by lines in public places in the State was held invalid on account of being imposed directly to gross earnings derived from interstate business.

It is apparent that none of these cases, except the *Hump Hairpin* case, is applicable to the facts in the present case, and they therefore have no value in determining the question here involved. This Court has said repeatedly that every case involving the validity of a tax must be decided upon its own facts, and that the facts upon which other cases were decided must be considered, in attempting to apply them to alleged similar cases. A consideration of the facts in the above cases relied on by the petitioner will show that they are not applicable to the present case.

III.

The statute and the tax assessed thereunder did not impose any direct or illegal burden upon any interstate commerce of the petitioner.

The petitioner asserts repeatedly in its brief that the tax assessed is a direct burden upon its interstate commerce and that a part of the tax was in fact assessed upon such commerce. The formula set out by the petitioner on page 14 of its brief shows that this assumption is not well founded. The alleged interstate business is only one of three elements used or considered in determining the proportion of capital stock represented by the business transacted and property located in Illinois. The tax is computed upon the proportion of capital stock so represented or used, and is not imposed directly upon any intrastate commerce or the proceeds thereof.

The petitioner seeks to exclude from the formula all of its business represented by sales made to purchasers outside the State. In so doing, the petitioner disregards the business carried on in its manufacturing operations in its factories in Illinois, together with the receipt and acceptance of orders for its goods at its office in that State, and considers solely the sale and shipment of its goods from its factories to purchasers in other states. That portion of its business is only the final act in disposing of goods produced by its manufacturing operations in the State, which determine the cost and value of such goods upon which the sales are made.

If the tax here had been computed on the capital stock represented by property admittedly used in Illinois

in producing the goods sold, it would have been very slightly less than the tax assessed, as suggested by the Court in the *Hump Hairpin* case (p. 295–6). Such a tax would have been entirely valid, although a part of such capital or property was used in producing goods sold in interstate commerce, as held by this Court in the *International Shoe Company* case (p. 433).

The bill in this case shows that 99.52 percent of the property of the petitioner is located and used in business in Illinois and that such property amounts to $1,193,103 more than the total amount of its issued capital stock. Although nearly all of the capital stock is used in such property in Illinois in producing the goods sold, the formula used by the petitioner would limit or restrict its franchise tax to only 52.2 percent of its capital stock, and exclude the remainder of such stock represented and used in its property and business in Illinois.

There is no proper basis for the attempt of the petitioner to allocate nearly one-half of its capital stock and property used in business in Illinois to interstate commerce alone, and thus to exclude such portion of the capital stock from consideration in computing its franchise tax. All of such stock is invested in the property used in business in that State and no part of it is set aside or used for carrying on business in interstate commerce.

All of such property was used in business within the State and therefore such busines is properly considered in connection with the property located in the State, in determining the amount of capital stock represented or used in Illinois, upon which the tax is computed. The amount of the tax does not vary directly with the amount of interstate business, or the business which has some element of interstate commerce, and does not increase or decrease in proportion to such commerce, as asserted by the petitioner in its brief . This Court has held that the statute does not impose a direct tax upon interstate commerce or the proceeds of such commerce. Neither does it accomplish any such a purpose and it is not intended to have that effect. The statute is clearly intended to and does apply only to capital stock represented by business carried on with the property located in the State.

The cases referred to by the petitioner here are not in point, as heretofore indicated herein. The statute considered in the recent New Jersey case imposed a direct tax on the gross receipts, part of which were derived from interstate commerce and therefore was held invalid to that extent. In the *Crew Levick* case, the tax was computed directly and solely on the proceeds of foreign commerce and was held invalid for that reason. The statement made by the Court in that case cannot properly be so adapted or changed as to apply to the statute and the

tax imposed in the present case, and the attempt of the petitioner to do so entirely misconstrues the provisions and effect of the statute.

There is no attempt in the present case to require a foreign corporation to submit to a tax on its interstate business as a condition to its right to do a local business within the State. Therefore, the case of *Western Union Telegraph Co.* v. *Kansas,* 216 U. S. 1, which sought to impose a license fee based upon the entire capital stock of the corporation, and other similar cases cited by petitioner, are entirely inapplicable to the present case. None of the principles set forth in those cases and quoted by the petitioner are violated or infringed upon by the statute and the tax here involved. The statement quoted from the *Airway* case referred to the tax rate as applied to a large amount of unissued stock, which necessarily imposed a burden on the interstate commerce of the corporation.

In the present case, the tax is computed only upon the proportion of issued capital stock represented by business transacted and property located in the State. Nearly all of the property of the corporation is located in Illinois and is used in carrying on manufacturing operations in that State. All of the business resulting from the use of such property in the State was therefore properly included, even though some of the products of

such business was sold and shipped to purchasers outside the State. The tax was computed solely on the proportion of issued capital stock so used or represented in the State.

The case of *International Paper Co.* v. *Massachusetts*, 246 U. S., 135, is not at all applicable. The tax there was imposed on the entire authorized capital stock of a foreign corporation having only a small part of its property and business in Massachusetts and with a large amount of property and business in other states and used in interstate commerce. There is no similarity of the facts in that case to the conditions in the present case.

As above shown, the petitioner is entirely unjustified in assuming that nearly one-half of its capital stock represents interstate commerce. No specific amount of its stock represents such commerce and no tax is imposed or computed on that basis. The proportion of capital stock on which the tax was computed was actually invested in property in Illinois and was used in carrying on business in that State. There was no ground for excluding nearly one-half of the amount of such stock in computing and assessing a franchise tax for the privilege of doing business in that State.

The attempt of the petitioner to disregard all of the business carried on in the State which resulted in the sale of its products outside the State is a misconception

of the provisions of the statute and the operations included in the business transacted. The exclusion of all such operations in carrying on the business, merely because the sale and final disposition of the products of such business had some element of interstate commerce, would disregard the material and substantial operations which produced and gave value to the goods and made possible the final sale and disposition of the products of the business. Such a view of the statute involved has been repeatedly condemned by this Court, in holding in the case of *Postal Telegraph Co.* v. *Adams*, 155 U. S., 688, 698, and many subsequent cases, that "the substance and not the shadow determines the validity of the exercise of the power."

IV.

The decision of this court in the Hump Hairpin case is decisive of the questions involved in the present case.

The petitioner under Point IV of its brief contends that the Supreme Court of Illinois was incorrect in stating that the decision of this Court in the *Hump Hairpin* case is decisive of the present case. The similarity of the statute and facts discussed by that Court and heretofore referred to in this brief clearly support such statement of the Court.

The purpose of the statute and the State Court not to impose any burden on interstate commerce, as stated

by this Court in that case, is still maintained and shown by substantially the same statute and the similar decision of that Court in this case. That Court assumed in its opinion in this case, in conformity with the view of this Court in the former case, that the sales to residents of other states was interstate business, but held pursuant to the decision of this Court that the business carried on in the State, as measured by such sales, was properly included in determining the amount of capital stock on which the tax was computed.

The petitioner assumes that in the prior case, as well as in this case, the State in computing the tax erroneously treated interstate business as intrastate, and that under the statement quoted, such supposed error should be corrected in this case. The Court merely stated in that case that if such an error had been made, it should be corrected in a proper case. The decisions of both Courts showed, however, that no such error was in fact made. Consequently, there was no reason, in either that case or the present case, for any correction in the computation of the tax.

It appears that the petitioner has entirely misconstrued the views expressed by the Court and the basis on which the statute and tax assessed was sustained. This Court clearly held that under the facts, the tax was prop-

erly computed on the capital stock represented by the property used and business carried on in the State, although the greater part of the products were sold and shipped in interstate commerce. The statute and the facts in the present case are substantially the same as in the prior case and therefore the same principles are applicable here.

This Court no doubt has the right to correct the amount of the tax, if any error was made in the computation, or in case any portion of the tax should be invalid. No such error appears to have been made or any invalidity exist, however, under the prior decisions of this Court in similar cases. The petitioner apparently concedes that this Court so held in the *Hump Hairpin* case, but seeks to discredit that decision and its controlling effect here.

The cases cited for that purpose involved materially different questions and facts. The *Airway* case, as already shown, involved a tax measured by a large amount of unissued stock, which afforded no basis for the tax assessed and therefore imposed an illegal burden on interstate commerce. There is no similarity between that case and the present case, in which the tax was measured by issued stock actually invested in the property used in business in the State. No part of the business carried on with such property so used can properly be excluded in determining the amount of stock represented by property and business in the State.

The petitioner refers to the holding of this Court in the *Hump Hairpin* case that the tax, so far as interstate commerce was concerned, was incidental, remote and unimportant, and that it was therefore constitutional, and suggests that this Court has held in two recent cases that even a slight burden may not be imposed upon such commerce. The Court so held in the cases cited on the ground that there was no legitimate basis for the tax imposed in those cases. If there is a proper basis for the tax, that principle does not apply, as shown by numerous decisions of this Court, but the assessment is valid, even though it may have an indirect or incidental effect on interstate commerce.

The cases referred to in the *Hump Hairpin* case sustain the decision in that case in principle, although the tax in some cases was computed upon a fund derived from business, instead of capital stock used in such business. In *Underwood Typewriter Co.* v. *Chamberlain* and some other cases, an annual tax was imposed in addition to the general property tax, but the same principle was applied as in the prior cases.

This is an excise or franchise tax for the privilege of doing business in the State, which is measured by the capital stock represented or used in business and property in the State, and not in any sense by gross receipts,

as stated by petitioner. The tax is not imposed on either gross receipts or property, and therefore has no similarity to the tax considered by this Court in the *New Jersey Bell Telephone* case.

Neither was the tax imposed on stock representing interstate business, and no such admission has been made, as assumed by petitioner. Such a conclusion is due to an erroneous conception of the basis on which the tax was computed. No attempt is made to impose a tax on interstate commerce as a condition for doing a local business or otherwise, and no case holds that the tax imposed has any such effect.

It seems clear that the statute and the tax assessed thereunder does not impose any direct or substantial burden on interstate commerce, when properly understood. The statute as applied has been directly sustained by this Court and is in harmony with the principles applied in many cases. No reason is shown for disregarding prior decisions and principles heretofore applied in such cases, and it is therefore urged that the decision of the Supreme Court of Illinois in this case be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 375—October Term, 1929.

Western Cartridge Company, Petitioner,
vs.
Louis L. Emmerson, Secretary of State of the State of Illinois.

On Writ of Certiorari to the Supreme Court of the State of Illinois.

[May 19, 1930.]

Mr. Justice Butler delivered the opinion of the Court.

Petitioner, a Delaware corporation licensed to do business in Illinois, brought this suit in the circuit court of Sangamon county to enjoin payment to the state treasurer of the amount of a license fee or franchise tax that respondent as secretary of state collected from petitioner under § 105 of the general corporation act of that State. The suit was based upon the claim that, as construed and enforced by respondent, the section violates the commerce clause of the Federal Constitution. Art. I, § 8, cl. 3. After hearing upon bill, answer and an agreed statement of facts the court dismissed the bill. The state supreme court (335 Ill. 150) affirmed the decree following our decision in *Hump Hairpin Co.* v. *Emmerson*, 258 U. S. 290, which affirmed 293 Ill. 387.

Section 105 provides: "Each corporation for profit, . . . except insurance companies, . . . organized under the laws of this state or admitted to do business in this state, . . . shall pay an annual license fee or franchise tax . . . of five cents on each one hundred dollars of the proportion of its issued capital stock . . . represented by business transacted and property located in this state, . . .".

Petitioner operates factories and has its principal office in Illinois. It there receives, upon forms furnished by it, orders for its products from persons in Illinois and elsewhere and by sending written acceptance consummates contracts of sale. In accordance with the directions contained in the orders, petitioner delivers

the goods at its factories to common carriers for transportation to purchasers at various destinations in Illinois, other States and foreign countries.

Petitioner had issued capital stock of the par value of $5,701,800; it had property valued at $6,924,804.92 of which $6,894,903.27 was situated in Illinois; its business for the year in question amounted to $11,670,925.51 of which $1,919,822.73 represented products shipped to purchasers in Illinois and $9,751,042.78, reported as interstate commerce, was made up of shipments to customers outside the State.

Respondent treated all of petitioner's business as having been transacted in Illinois and based the tax on such proportion of its outstanding capital stock as its business plus its Illinois property was of such business and all its property. The tax so calculated amounted to $2,808.03, a substantial part of which resulted from the inclusion of the transactions reported by petitioner as interstate commerce.

All of the goods sold were manufactured by the petitioner in Illinois and the manufacturing was business carried on in that State. The receipt and acceptance of orders, the packing, giving shipping directions and delivery to common carriers also constituted business in that State; these things were common to all sales whether the goods sold were sent to destinations within or without the State, but as to products shipped to other States or foreign countries the acceptance of orders and what was subsequently done by petitioner became component parts of interstate or foreign commerce. *Dahnke-Walker Co.* v. *Bondurant*, 257 U. S. 282, 290. *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50, 54. *Flanagan* v. *Federal Coal Co.*, 267 U. S. 222, 225. *Federal Trade Commission* v. *Pacific Paper Assn.*, 273 U. S. 52, 63-64.

Unquestionably Illinois has power to tax all petitioner's property therein without regard to its use in connection with interstate transactions and to impose a license fee or excise upon petitioner's local business. *International Paper Co.* v. *Massachusetts*, 246 U. S. 135, 141. The tax in question was not laid directly upon interstate commerce or any of its elements. For the determination of the amount the taxpayer's business and property located in Illinois is divided by the total of all its business and property and that percentage is applied to the issued shares and the resulting number taken for taxation at the rate of five cents per $100. As the amount

depends on the relation each to the others of the various elements employed in the calculation, the fee or tax does not directly depend upon the amount of the taxpayer's interstate transactions. The exaction may rise while the sales to customers outside Illinois decline and may fall while such sales increase.

The amount imposed upon petitioner did not even indirectly burden the interstate transportation resulting from the shipping directions given by petitioner in fulfillment of its contracts of sale. There is nothing to indicate that by the enactment in question the State intended to regulate or burden such commerce or to discriminate as between sales to Illinois customers and those made to buyers in other States and countries. The tax cannot be said directly or by necessary operation to affect any of the things done by petitioner which, by reason of transportation of goods to places outside Illinois in accordance with the directions of the purchasers, became elements or component parts of interstate or foreign commerce. Petitioner's sales prices are based on deliveries to common carriers at its factories. The expense of transportation is not involved in the calculation. And it is plain that, if the fee or tax in question affected petitioner's interstate or foreign commerce at all, the burden was indirect and remote and not a violation of the commerce clause.

The petitioner relies on *Air-way Corp.* v. *Day*, 266 U. S. 71. But, as shown by the opinion, the tax considered in that case was based on the authorized capital stock and the rate was applied to a number of shares greatly in excess of the total of all that had been issued. The company was authorized to issue 400,000 shares; it had issued only 50,485 and these represented all its property and business. The tax at the rate of five cents each on 298,520 shares was held directly to burden the company's interstate commerce. Cf. *Cudahy Co.* v. *Hinkle*, 278 U. S. 460. The case now under consideration cannot be distinguished from *Hump Hairpin Co.* v. *Emmerson, supra.* And see *International Shoe Co.* v. *Shartel*, 279 U. S. 429, 433.

Decree affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.